[redacted]
College of Law
[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Cal.Rep. 91–92 P.2d—a

# CALIFORNIA REPORTER

COVERING CASES REPORTED IN

## PACIFIC REPORTER
## SECOND SERIES

91 P.2d – 92 P.2d

---

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1939, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 91, Nos. 1-4;
Vol. 92, Nos. 1-5.

---

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.91-92 P.2d
5th Reprint—1974

# CASES REPORTED

| | Vol. | | Page |
|---|---|---|---|
| Aldridge; First Nat. Bank v., App. | 92 | P.2d | 674 |
| Allshouse; Davis v., Sup. | 91 | P.2d | 887 |
| Allshouse's Estate, In re, Sup. | 91 | P.2d | 887 |
| Anderson, Ex parte, App. | 91 | P.2d | 621 |
| Anderson, In re, App. | 92 | P.2d | 1020 |
| Anderson; People v., App. | 91 | P.2d | 241 |
| Andrews v. California Trust Co., App. | 92 | P.2d | 646 |
| Anglo California Nat. Bank of San Francisco; De Graf v., Sup. | 92 | P.2d | 899 |
| Ashley; Chambers v., App. | 91 | P.2d | 932 |
| Baer v. Tippett, App. | 92 | P.2d | 1028 |
| Baker v. Gibson, Sup. | 92 | P.2d | 796 |
| Baker v. Hudson, App. | 92 | P.2d | 959 |
| Barnett v. La Mesa Post No. 282, American Legion, Department of California, App. | 92 | P.2d | 461 |
| Barr; Gordon v., Sup. | 91 | P.2d | 101 |
| Baxter's Estate, In re, App. | 91 | P.2d | 962 |
| Beckett v. City of Paris Dry Goods Co., two cases, App. | 91 | P.2d | 205 |
| Bergman v. Ornbaun, App. | 92 | P.2d | 654 |
| Bigelow; Whelan v., App. | 92 | P.2d | 952 |
| Black Co.; Johnston v., App. | 91 | P.2d | 921 |
| Bolz; Nesbitt v., Sup. | 91 | P.2d | 879 |
| Bouchard; Hall v., App. | 91 | P.2d | 612 |
| Boyd; Brown v., App. | 91 | P.2d | 926 |
| Braun; People v., Sup. | 92 | P.2d | 402 |
| Bresh; People v., App. | 91 | P.2d | 193 |
| Bridge Inv. Co.; Collins v., Sup. | 92 | P.2d | 801 |
| Brock; Jersey Maid Milk Products Co. v., Sup. | 91 | P.2d | 577 |
| Brock; Jersey Maid Milk Products Co. v., Sup. | 91 | P.2d | 599 |
| Brooks; Longley v., Sup. | 92 | P.2d | 394 |
| Brothers of Christian Schools; Morgan v., App. | 92 | P.2d | 925 |
| Brown v. Boyd, App. | 91 | P.2d | 926 |
| Brown; McMillan Process Co. v., App. | 91 | P.2d | 613 |
| Buckel; Little v., App. | 92 | P.2d | 446 |
| Burnside; Olender v., App. | 92 | P.2d | 499 |
| Burt, Ex parte, App. | 92 | P.2d | 492 |
| Bushey v. Rigby, App. | 92 | P.2d | 1032 |
| Byington v. Superior Court of Stanislaus County, Sup. | 92 | P.2d | 896 |
| California Junior Republic; Isom v., App. | 91 | P.2d | 121 |
| California Trust Co.; Andrews v., App. | 92 | P.2d | 646 |
| Camp v. Peel, App. | 92 | P.2d | 428 |
| Carey; Foster v., App. | 92 | P.2d | 444 |
| Carothers; Tanner v., App. | 91 | P.2d | 170 |
| Carpenter; Garris v., App. | 92 | P.2d | 688 |
| Castel; Joost v., App. | 91 | P.2d | 172 |
| Chambers v. Ashley, App. | 91 | P.2d | 932 |
| Cherokee Drift Mining Co.; Wilson v., Sup. | 92 | P.2d | 802 |
| Christal v. Police Commission of City and County of San Francisco, App. | 92 | P.2d | 416 |
| Church v. Payne, Super. | 92 | P.2d | 406 |
| City and County of San Francisco; Meridian, Limited, v., Sup. | 91 | P.2d | 105 |
| City of Los Angeles; Lanahan v., Sup. | 92 | P.2d | 1014 |
| City of Paris Dry Goods Co.; Beckett v., App. | 91 | P.2d | 205 |

| | Vol. | | Page |
|---|---|---|---|
| City of San Diego; Davis v., App. | 91 | P.2d | 640 |
| City of Sunnyvale; Skalko v., App. | 91 | P.2d | 168 |
| Clark's Estate, In re, App. | 92 | P.2d | 505 |
| Clear Lake Water Co. v. Superior Court in and for Mendocino County, App. | 92 | P.2d | 921 |
| Clevelin Realty Corporation; Darr v., App. | 92 | P.2d | 475 |
| Cole v. State Personnel Board of California, App. | 92 | P.2d | 512 |
| Collins v. Bridge Inv. Co., Sup. | 92 | P.2d | 801 |
| Commercial Transfer v. Daigh & Stewart, App. | 91 | P.2d | 951 |
| Condra v. Errett, App. | 92 | P.2d | 489 |
| Cook v. Los Angeles R. Corporation, Sup. | 91 | P.2d | 118 |
| Cook v. Maier, App. | 92 | P.2d | 434 |
| Courts v. Thomson, App. | 91 | P.2d | 135 |
| Craemer v. Norton Realty Co., App. | 91 | P.2d | 644 |
| Crocker First Nat. Bank v. Waite, App. | 91 | P.2d | 617 |
| Crocker First Nat. Bank v. Waite, App. | 91 | P.2d | 620 |
| Crownover; People v., App. | 92 | P.2d | 929 |
| Daigh & Stewart; Commercial Transfer v., App. | 91 | P.2d | 951 |
| Dargie's Estate, In re, App. | 91 | P.2d | 126 |
| Darr v. Clevelin Realty Corporation, App. | 92 | P.2d | 475 |
| Davenport; People v., Sup. | 91 | P.2d | 892 |
| Davis v. Allshouse, Sup. | 91 | P.2d | 887 |
| Davis v. City of San Diego, App. | 91 | P.2d | 640 |
| De Caristo; Fresno City High School Dist. v., App. | 92 | P.2d | 668 |
| De Graf v. Anglo California Nat. Bank of San Francisco, Sup. | 92 | P.2d | 899 |
| De Guire v. Police Commission of City and County of San Francisco, App. | 92 | P.2d | 423 |
| De Soto; People v., App. | 92 | P.2d | 466 |
| Diamond; People v., App. | 92 | P.2d | 486 |
| Doe; Feinberg v., Sup. | 92 | P.2d | 640 |
| Donelley; Peterson v., App. | 91 | P.2d | 123 |
| Donohoe Kelly Banking Co.; Wilbur v., App. | 91 | P.2d | 910 |
| Drapeau; McAllister v., Sup. | 92 | P.2d | 911 |
| Drumar Mining Co. v. Morris Ravine Mining Co., App. | 92 | P.2d | 424 |
| Eakle; Switzer v., App. | 91 | P.2d | 954 |
| Eakle's Estate, In re, App. | 91 | P.2d | 954 |
| Edwards; Norman v., App. | 92 | P.2d | 505 |
| Elliott v. Kremer, App. | 92 | P.2d | 468 |
| Ellis; People v., App. | 92 | P.2d | 431 |
| Elmer; Wedemeyer v., App. | 91 | P.2d | 642 |
| Engelberg; Goldberg v., App. | 92 | P.2d | 935 |
| Equitable Life Assur. Soc. of United States; Wall v., App. | 91 | P.2d | 145 |
| Ericsson & Mudd; Hampton v., App. | 91 | P.2d | 914 |
| Ericsson & Mudd; Vassar v., App. | 91 | P.2d | 914 |
| Errett; Condra v., App. | 92 | P.2d | 489 |
| Estrin v. Superior Court in and for Sacramento County, App. | 91 | P.2d | 912 |
| Evans v. Superior Court of City and County of San Francisco, Sup. | 91 | P.2d | 1056 |
| Farmers & Merchants Nat. Bank v. Reed, App. | 91 | P.2d | 944 |
| Federal Finance Co.; Leslie v., Sup. | 92 | P.2d | 906 |
| Feinberg v. Doe, Sup. | 92 | P.2d | 640 |
| Felton Chemical Co. v. Superior Court in and for Los Angeles County, App. | 92 | P.2d | 684 |
| Fiegelman; People v., App. | 91 | P.2d | 156 |
| First Nat. Bank v. Aldridge, App. | 92 | P.2d | 674 |
| First Nat. Bank; Haskell v., App. | 91 | P.2d | 934 |
| Fitzpatrick; Harada v., App. | 91 | P.2d | 941 |
| Fleming v. Fleming, App. | 91 | P.2d | 602 |
| Forbes v. Sills, App. | 91 | P.2d | 246 |
| Foster v. Carey, App. | 92 | P.2d | 444 |

| | Vol. | | Page |
|---|---|---|---|
| Foster v. Hudson, App. | 92 | P.2d | 959 |
| Fresno City High School Dist. v. De Caristo, App. | 92 | P.2d | 668 |
| Fritsche v. McCue, App. | 92 | P.2d | 928 |
| Fritz; Stoneman v., App. | 92 | P.2d | 1035 |
| Gaines' Estate, In re, App. | 92 | P.2d | 646 |
| Gallagher; Hall v., App. | 91 | P.2d | 612 |
| Gallardo v. Luke, App. | 91 | P.2d | 211 |
| Garris v. Carpenter, App. | 92 | P.2d | 688 |
| Gavin; Manning v., Sup. | 92 | P.2d | 795 |
| Gibson; Baker v., Sup. | 92 | P.2d | 796 |
| Goddard v. Security Title Insurance & Guarantee Co., Sup. | 92 | P.2d | 804 |
| Goldberg v. Engelberg, App. | 92 | P.2d | 935 |
| Gomes v. Warn, App. | 91 | P.2d | 214 |
| Gonzales; People v., App. | 92 | P.2d | 482 |
| Goodale; People v., App. | 91 | P.2d | 163 |
| Goodcell; McDonough v., Sup. | 91 | P.2d | 1035 |
| Goodspeed v. Great Western Power Co. of California, App. | 91 | P.2d | 623 |
| Goodspeed v. Great Western Power Co. of California, App. | 92 | P.2d | 410 |
| Gordon v. Barr, Sup. | 91 | P.2d | 101 |
| Grant v. Long, App. | 92 | P.2d | 940 |
| Grant Memorial Park v. Robla School Dist., App. | 92 | P.2d | 499 |
| Gray v. Robinson, App. | 91 | P.2d | 194 |
| Great Western Power Co. of California; Goodspeed v., App. | 91 | P.2d | 623 |
| Great Western Power Co. of California; Goodspeed v., App. | 92 | P.2d | 410 |
| Haas; Los Angeles Orphans' Home Soc. v., App. | 91 | P.2d | 960 |
| Haglund; Lomax v., App. | 91 | P.2d | 210 |
| Hall v. Bouchard, App. | 91 | P.2d | 612 |
| Hall v. Gallagher, App. | 91 | P.2d | 612 |
| Hall v. Sampson, App. | 91 | P.2d | 609 |
| Hames v. Rust, Sup. | 92 | P.2d | 1010 |
| Hampton v. Ericsson & Mudd, App. | 91 | P.2d | 914 |
| Harada v. Fitzpatrick, App. | 91 | P.2d | 941 |
| Haskell v. First Nat. Bank, App. | 91 | P.2d | 934 |
| Hayden v. Paramount Productions, App. | 91 | P.2d | 231 |
| Hays v. Superior Court in and for Los Angeles County, App. | 92 | P.2d | 665 |
| Hebbard; Williams v., App. | 92 | P.2d | 657 |
| Hector; People v., App. | 91 | P.2d | 931 |
| Hill v. Security First Nat. Bank, App. | 91 | P.2d | 133 |
| Hoffart v. Southern Pac. Co., App. | 92 | P.2d | 436 |
| Holback; Willis v., App. | 91 | P.2d | 140 |
| Holubar v. Superior Court of Riverside County, App. | 91 | P.2d | 915 |
| Honig v. Southern Pac. Co., App. | 92 | P.2d | 436 |
| Hubbard v. Mt. Raymond Mining Co., App. | 92 | P.2d | 411 |
| Hudson; Baker v., App. | 92 | P.2d | 959 |
| Hudson; Foster v., App. | 92 | P.2d | 959 |
| Hunt's Estate, In re, App. | 91 | P.2d | 609 |
| Hunt's Estate, In re, App. | 91 | P.2d | 612 |
| Hurwitz; Shelley v., App. | 92 | P.2d | 660 |
| Imperial Irr. Dist.; Skupen v., App. | 91 | P.2d | 910 |
| Industrial Accident Commission; Moquin v., App. | 92 | P.2d | 413 |
| Industrial Accident Commission; Zolkover v., Sup. | 91 | P.2d | 106 |
| I. N. Parlier Estate Co.; Lawrence v., App. | 92 | P.2d | 917 |
| Isom v. California Junior Republic, App. | 91 | P.2d | 121 |
| Jack v. Wong Shee, App. | 92 | P.2d | 449 |
| Jackson, Ex parte, App. | 92 | P.2d | 951 |
| Jersey Maid Milk Products Co. v. Brock, Sup. | 91 | P.2d | 577 |
| Jersey Maid Milk Products Co. v. Brock, Sup. | 91 | P.2d | 599 |
| Johnson; Standard Oil Co. of California v., App. | 92 | P.2d | 470 |
| Johnston v. Black Co., App. | 91 | P.2d | 921 |

| | Vol. | | Page |
|---|---|---|---|
| Johnston v. Johnston, App. | 91 | P.2d | 142 |
| Jones; Pacific Coast Joint Stock Land Bank of San Francisco v., Sup. | 92 | P.2d | 390 |
| Jones v. Robinson, App. | 91 | P.2d | 194 |
| Joost v. Castel, App. | 91 | P.2d | 172 |
| Kane v. Universal Film Exchanges, Sup. | 91 | P.2d | 577 |
| Keet's Estate, In re, App. | 91 | P.2d | 944 |
| Kermott; People v., App. | 91 | P.2d | 215 |
| Kindig v. Palos Verdes Homes Ass'n, App. | 91 | P.2d | 645 |
| King; People v., App. | 92 | P.2d | 510 |
| Kisner; Taylor v., App. | 91 | P.2d | 933 |
| Knecht v. Lombardo, App. | 91 | P.2d | 917 |
| Kramer v. Sanguinetti, App. | 91 | P.2d | 604 |
| Kremer; Elliott v., App. | 92 | P.2d | 468 |
| Krug; People v., App. | 91 | P.2d | 637 |
| Lacoe v. San Diego County, App. | 92 | P.2d | 809 |
| La Mesa Post No. 282, American Legion, Department of California; Barnett v., App. | 92 | P.2d | 461 |
| Lampman; Pitcher v., App. | 92 | P.2d | 495 |
| Lampman's Estate, In re, App. | 92 | P.2d | 495 |
| Lanahan v. City of Los Angeles, Sup. | 92 | P.2d | 1014 |
| Lane v. Safeway Stores, App. | 91 | P.2d | 160 |
| Lariscy; People v., Sup. | 92 | P.2d | 638 |
| Lawrence v. I. N. Parlier Estate Co., App. | 92 | P.2d | 917 |
| Lawrence; National Sanitary Rag Co. v., App. | 91 | P.2d | 120 |
| Lawrence v. Rosenberg, App. | 91 | P.2d | 209 |
| Lee v. Small Claims Court of Judicial Tp. No. 4, Imperial County, App. | 92 | P.2d | 937 |
| Leonis; Shea v., Sup. | 92 | P.2d | 400 |
| Leslie v. Federal Finance Co., Sup. | 92 | P.2d | 906 |
| Little v. Buckel, App. | 92 | P.2d | 446 |
| Lomax v. Haglund, App. | 91 | P.2d | 210 |
| Lombardo; Knecht v., App. | 91 | P.2d | 917 |
| London v. McConkey, App. | 92 | P.2d | 456 |
| Long; Grant v., App. | 92 | P.2d | 940 |
| Longley v. Brooks, Sup. | 92 | P.2d | 394 |
| Longway v. Newbery, Sup. | 91 | P.2d | 110 |
| Los Angeles Orphans' Home Soc. v. Haas, App. | 91 | P.2d | 960 |
| Los Angeles R. Corporation; Cook v., Sup. | 91 | P.2d | 118 |
| Luke; Gallardo v., App. | 91 | P.2d | 211 |
| McAllister v. Drapeau, Sup. | 92 | P.2d | 911 |
| McConkey; London v., App. | 92 | P.2d | 456 |
| McConkey's Estate, In re, App. | 92 | P.2d | 456 |
| McCue; Fritsche v., App. | 92 | P.2d | 928 |
| McDonough v. Goodcell, Sup. | 91 | P.2d | 1035 |
| McKinley; Sullivan v., Sup. | 92 | P.2d | 892 |
| McMillan Process Co. v. Brown, App. | 91 | P.2d | 613 |
| McPheeters; Scott v., App. | 92 | P.2d | 678 |
| Mahoney; People v., Sup. | 91 | P.2d | 1029 |
| Maier; Cook v., App. | 92 | P.2d | 434 |
| Manning v. Gavin, Sup. | 92 | P.2d | 795 |
| Margellini v. Pacific Automobile Ins. Co., App. | 91 | P.2d | 136 |
| Martin, Appeal of, App. | 91 | P.2d | 126 |
| Medical Finance Ass'n v. Short, Super. | 92 | P.2d | 961 |
| Meridian, Limited, v. City and County of San Francisco, Sup. | 91 | P.2d | 105 |
| Metropolitan Life Ins. Co.; Sweeney v., Super. | 92 | P.2d | 1043 |
| Miropol; People v., App. | 91 | P.2d | 230 |
| Mitchell v. Pacific Greyhound Lines, App. | 91 | P.2d | 176 |
| Mohr v. Mohr, App. | 91 | P.2d | 238 |
| Moquin v. Industrial Accident Commission, App. | 92 | P.2d | 413 |
| Morgan v. Brothers of Christian Schools, App. | 92 | P.2d | 925 |

| | Vol. | | Page |
|---|---|---|---|
| Morris; People v., App. | 92 | P.2d | 644 |
| Morrison v. Mutual Life Ins. Co. of New York, App. | 92 | P.2d | 1024 |
| Morris Ravine Mining Co.; Drumar Mining Co. v., App. | 92 | P.2d | 424 |
| Morro, In re, Sup. | 92 | P.2d | 1012 |
| Morro v. Morro, Sup. | 92 | P.2d | 1012 |
| Mt. Raymond Mining Co.; Hubbard v., App. | 92 | P.2d | 411 |
| Mt. Raymond Mining Co.; Smith v., App. | 92 | P.2d | 411 |
| Murphy v. Rennie, Sup. | 91 | P.2d | 1042 |
| Mutual Life Ins. Co. of New York; Morrison v., App. | 92 | P.2d | 1024 |
| Mylar v. Robinson, App. | 91 | P.2d | 194 |
| Myrick v. O'Neill, App. | 92 | P.2d | 651 |
| National Sanitary Rag Co. v. Lawrence, App. | 91 | P.2d | 120 |
| Nesbitt v. Bolz, Sup. | 91 | P.2d | 879 |
| Newbery; Longway v., Sup. | 91 | P.2d | 110 |
| Norman v. Edwards, App. | 92 | P.2d | 505 |
| Norton Realty Co.; Craemer v., App. | 91 | P.2d | 644 |
| Olender v. Burnside, App. | 92 | P.2d | 499 |
| O'Neill; Myrick v., App. | 92 | P.2d | 651 |
| Ornbaun; Bergman v., App. | 92 | P.2d | 654 |
| Pacific Automobile Ins. Co.; Margellini v., App. | 91 | P.2d | 136 |
| Pacific Coast Joint Stock Land Bank of San Francisco v. Jones, Sup. | 92 | P.2d | 390 |
| Pacific Gas & Electric Co.; Tehama County v., App. | 91 | P.2d | 936 |
| Pacific Greyhound Lines; Mitchell v., App. | 91 | P.2d | 176 |
| Pacific Indemnity Co.; Woodman v., App. | 91 | P.2d | 898 |
| Paine v. State Bar of California, Sup. | 91 | P.2d | 877 |
| Palos Verdes Homes Ass'n; Kindig v., App. | 91 | P.2d | 645 |
| Paramount Productions; Hayden v., App. | 91 | P.2d | 231 |
| Parman; People v., Sup. | 92 | P.2d | 387 |
| Pate, Ex parte, App. | 92 | P.2d | 643 |
| Paterson; Slemons v., App. | 92 | P.2d | 956 |
| Payne; Church v., Super. | 92 | P.2d | 406 |
| Peel; Camp v., App. | 92 | P.2d | 428 |
| People v. Anderson, App. | 91 | P.2d | 241 |
| People v. Braun, Sup. | 92 | P.2d | 402 |
| People v. Bresh, App. | 91 | P.2d | 193 |
| People v. Crownover, App. | 92 | P.2d | 929 |
| People v. Davenport, Sup. | 91 | P.2d | 892 |
| People v. De Soto, App. | 92 | P.2d | 466 |
| People v. Diamond, App. | 92 | P.2d | 486 |
| People v. Ellis, App. | 92 | P.2d | 431 |
| People v. Fiegelman, App. | 91 | P.2d | 156 |
| People v. Gonzales, App. | 92 | P.2d | 482 |
| People v. Goodale, App. | 91 | P.2d | 163 |
| People v. Hector, App. | 91 | P.2d | 931 |
| People v. Kermott, App. | 91 | P.2d | 215 |
| People v. King, App. | 92 | P.2d | 510 |
| People v. Krug, App. | 91 | P.2d | 637 |
| People v. Lariscy, Sup. | 92 | P.2d | 638 |
| People v. Mahoney, Sup. | 91 | P.2d | 1029 |
| People v. Miropol, App. | 91 | P.2d | 230 |
| People v. Morris, App. | 92 | P.2d | 644 |
| People v. Parman, Sup. | 92 | P.2d | 387 |
| People v. Pierce, App. | 91 | P.2d | 150 |
| People v. Pociask, App. | 91 | P.2d | 199 |
| People v. Rothrock, Sup. | 92 | P.2d | 634 |
| People v. Sambrano, App. | 91 | P.2d | 221 |
| People v. Sikora, App. | 91 | P.2d | 150 |
| People v. Silverman, App. | 92 | P.2d | 507 |
| People v. Smith, Super. | 92 | P.2d | 1039 |

| | Vol. | | Page |
|---|---|---|---|
| People v. Spinelli, Sup. | 92 | P.2d | 1017 |
| People v. Steel, Super. | 92 | P.2d | 815 |
| People v. Tagawa, App. | 92 | P.2d | 650 |
| People v. Wiley, App. | 91 | P.2d | 907 |
| People v. Wilson, App. | 91 | P.2d | 207 |
| People v. Wynn, App. | 92 | P.2d | 445 |
| People v. Zimbrolt, Super. | 91 | P.2d | 252 |
| Peterson, Ex parte, Sup. | 92 | P.2d | 890 |
| Peterson v. Donelley, App. | 91 | P.2d | 123 |
| Pierce; People v., App. | 91 | P.2d | 150 |
| Pitcher v. Lampman, App. | 92 | P.2d | 495 |
| Plott v. York, App. | 91 | P.2d | 924 |
| Pociask; People v., App. | 91 | P.2d | 199 |
| Pole; Taylor v., App. | 92 | P.2d | 483 |
| Police Commission of City and County of San Francisco; Christal v., App. | 92 | P.2d | 416 |
| Police Commission of City and County of San Francisco; De Guire v., App. | 92 | P.2d | 423 |
| Police Commission of City and County of San Francisco; Roche v., App. | 92 | P.2d | 422 |
| Pomin's Estate, In re, App. | 92 | P.2d | 479 |
| Proctor v. Pyle, App. | 91 | P.2d | 187 |
| Pyle; Proctor v., App. | 91 | P.2d | 187 |
| Rattray's Estate, In re, Sup. | 91 | P.2d | 1042 |
| Reed; Farmers & Merchants Nat. Bank v., App. | 91 | P.2d | 944 |
| Rennie; Murphy v., Sup. | 91 | P.2d | 1042 |
| Renwick; Sparks v., Sup. | 91 | P.2d | 1052 |
| Richardson v. Royal Indemnity Co., App. | 91 | P.2d | 962 |
| Rigby; Bushey v., App. | 92 | P.2d | 1032 |
| Robinson; Gray v., App. | 91 | P.2d | 194 |
| Robinson; Jones v., App. | 91 | P.2d | 194 |
| Robinson; Mylar v., App. | 91 | P.2d | 194 |
| Robla School Dist.; Grant Memorial Park v., App. | 92 | P.2d | 499 |
| Roche v. Police Commission of City and County of San Francisco, App. | 92 | P.2d | 422 |
| Rosenberg; Lawrence v., App. | 91 | P.2d | 209 |
| Rothrock, In re, two cases, Sup. | 92 | P.2d | 634 |
| Rothrock; People v., Sup. | 92 | P.2d | 634 |
| Royal Indemnity Co.; Richardson v., App. | 91 | P.2d | 962 |
| Rust; Hames v., Sup. | 92 | P.2d | 1010 |
| Safeway Stores; Lane v., App. | 91 | P.2d | 160 |
| Sambrano; People v., App. | 91 | P.2d | 221 |
| Sampson; Hall v., App. | 91 | P.2d | 609 |
| San Diego County; Lacoe v., App. | 92 | P.2d | 809 |
| Sanguinetti; Kramer v., App. | 91 | P.2d | 604 |
| Schrank v. Sterling Products Co., App. | 91 | P.2d | 143 |
| Scott v. McPheeters, App. | 92 | P.2d | 678 |
| Security First Nat. Bank; Hill v., App. | 91 | P.2d | 133 |
| Security Title Insurance & Guarantee Co.; Goddard v., Sup. | 92 | P.2d | 804 |
| Shea v. Leonis, Sup. | 92 | P.2d | 400 |
| Shelley v. Hurwitz, App. | 92 | P.2d | 660 |
| Short; Medical Finance Ass'n v., Super. | 92 | P.2d | 961 |
| Sikora; People v., App. | 91 | P.2d | 150 |
| Sills v. Forbes, App. | 91 | P.2d | 246 |
| Silverman; People v., App. | 92 | P.2d | 507 |
| Skalko v. City of Sunnyvale, App. | 91 | P.2d | 168 |
| Skupen v. Imperial Irr. Dist., App. | 91 | P.2d | 910 |
| Slack's Estate, In re, Sup. | 91 | P.2d | 1052 |
| Slemons v. Paterson, App. | 92 | P.2d | 956 |

| | Vol. | | Page |
|---|---|---|---|
| Small Claims Court of Judicial Tp. No. 4, Imperial County; Lee v., App. | 92 | P.2d | 937 |
| Smith v. Mt. Raymond Mining Co., App. | 92 | P.2d | 411 |
| Smith; People v., Super. | 92 | P.2d | 1039 |
| Southern Pac. Co.; Hoffart v., App. | 92 | P.2d | 436 |
| Southern Pac. Co.; Honig v., App. | 92 | P.2d | 436 |
| Sparks v. Renwick, Sup. | 91 | P.2d | 1052 |
| Spinelli; People v., Sup. | 92 | P.2d | 1017 |
| Standard Oil Co. of California v. Johnson, App. | 92 | P.2d | 470 |
| State Bar of California; Paine v., Sup. | 91 | P.2d | 877 |
| State Bar of California; Werner v., Sup. | 91 | P.2d | 881 |
| State Personnel Board of California; Cole v., App. | 92 | P.2d | 512 |
| Steel; People v., Super. | 92 | P.2d | 815 |
| Stephenson v. Unemployment Reserves Commission of California, App. | 92 | P.2d | 931 |
| Sterling Products Co.; Schrank v., App. | 91 | P.2d | 143 |
| Stoneman v. Fritz, App. | 92 | P.2d | 1035 |
| Sullivan v. McKinley, Sup. | 92 | P.2d | 892 |
| Superior Court in and for Los Angeles County; Felton Chemical Co. v., App. | 92 | P.2d | 684 |
| Superior Court in and for Los Angeles County; Hays v., App. | 92 | P.2d | 665 |
| Superior Court in and for Los Angeles County; Williams v., App. | 91 | P.2d | 152 |
| Superior Court in and for Mendocino County; Clear Lake Water Co. v., App. | 92 | P.2d | 921 |
| Superior Court in and for Sacramento County; Estrin v., App. | 91 | P.2d | 912 |
| Superior Court in and for Sacramento County; Waterland v., App. | 91 | P.2d | 220 |
| Superior Court of City and County of San Francisco; Evans v., Sup. | 91 | P.2d | 1056 |
| Superior Court of Riverside County; Holubar v., App. | 91 | P.2d | 915 |
| Superior Court of Stanislaus County; Byington v., Sup. | 92 | P.2d | 896 |
| Sweeney v. Metropolitan Life Ins. Co., Super. | 92 | P.2d | 1043 |
| Sweet v. Watson's Nursery, App. | 92 | P.2d | 812 |
| Switzer v. Eakle, App. | 91 | P.2d | 954 |
| Tagawa; People v., App. | 92 | P.2d | 650 |
| Tanner v. Carothers, App. | 91 | P.2d | 170 |
| Tanner's Estate, In re, App. | 91 | P.2d | 170 |
| Taylor v. Kisner, App. | 91 | P.2d | 933 |
| Taylor v. Pole, App. | 92 | P.2d | 483 |
| Tehama County v. Pacific Gas & Electric Co., App. | 91 | P.2d | 936 |
| Thomson; Courts v., App. | 91 | P.2d | 135 |
| Tippett; Baer v., App. | 92 | P.2d | 1028 |
| Unemployment Reserves Commission of California; Stephenson v., App. | 92 | P.2d | 931 |
| Universal Film Exchanges; Kane v., Sup. | 91 | P.2d | 577 |
| Vassar v. Ericsson & Mudd, App. | 91 | P.2d | 914 |
| Vitrano v. Westgate Sea Products Co., App. | 91 | P.2d | 617 |
| Waite; Crocker First Nat. Bank v., App. | 91 | P.2d | 617 |
| Waite; Crocker First Nat. Bank v., App. | 91 | P.2d | 620 |
| Waite's Guardianship, In re, App. | 91 | P.2d | 617 |
| Waite's Guardianship, In re, App. | 91 | P.2d | 620 |
| Wall v. Equitable Life Assur. Soc. of United States, App. | 91 | P.2d | 145 |
| Warn; Gomes v., App. | 91 | P.2d | 214 |
| Waterland v. Superior Court in and for Sacramento County, App. | 91 | P.2d | 220 |
| Watson's Nursery; Sweet v., App. | 92 | P.2d | 812 |
| Wedemeyer v. Elmer, App. | 91 | P.2d | 642 |
| Werner v. State Bar of California, Sup. | 91 | P.2d | 881 |
| Westgate Sea Products Co.; Vitrano v., App. | 91 | P.2d | 617 |
| Whelan v. Bigelow, App. | 92 | P.2d | 952 |
| Wilbur v. Donohoe Kelly Banking Co., App. | 91 | P.2d | 910 |
| Wiley; People v., App. | 91 | P.2d | 907 |
| Williams v. Hebbard, App. | 92 | P.2d | 657 |

| | Vol. | | Page |
|---|---|---|---|
| Williams v. Superior Court in and for Los Angeles County, App. | 91 | P.2d | 152 |
| Willis v. Holback, App. | 91 | P.2d | 140 |
| Wilson v. Cherokee Drift Mining Co., Sup. | 92 | P.2d | 802 |
| Wilson; People v., App. | 91 | P.2d | 207 |
| Wong Shee; Jack v., App. | 92 | P.2d | 449 |
| Woodman v. Pacific Indemnity Co., App. | 91 | P.2d | 898 |
| Wynn; People v., App. | 92 | P.2d | 445 |
| York; Plott v., App. | 91 | P.2d | 924 |
| Zens' Estate, In re, App. | 91 | P.2d | 960 |
| Zimbrolt; People v., Super. | 91 | P.2d | 252 |
| Zolkover v. Industrial Accident Commission, Sup. | 91 | P.2d | 106 |

# CALIFORNIA REPORTER

IN VOLUME

## 91 PACIFIC REPORTER

SECOND SERIES

13 Cal.2d 596

## GORDON v. BARR.

L. A. 16228.

Supreme Court of California.

May 31, 1939.

**1. Appeal and error 🔑931(1)**

Findings of trial court should be construed so as to support the judgment.

**2. Appeal and error 🔑931(1)**

Finding that assignments of mortgage and indebtedness secured thereby were delivered to assignee upon understanding that upon death of assignor funds, property, and indebtedness should remain property of assignee, his heirs and assigns, "free and clear of any trust or obligation whatsoever," would not be construed as vesting title in assignee only on assignor's death where it was susceptible of interpretation that, on death of assignor, funds should be free of any trust or obligation which interpretation supported judgment that valid gift was effected.

**3. Gifts 🔑49(3)**

The requirement for delivery in gifts protects the property of individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that donor really intended to part with his property.

**4. Gifts 🔑18(2)**

Where donor's acts unequivocally show that he intended to divest himself of ownership of property, gift will be upheld.

**5. Gifts 🔑11**

A donor may make a valid gift of property reserving to himself a life interest in or a life income from property given.

**6. Trusts 🔑59(3)**

Gifts in trust in which donor reserves the right to revoke the trust are not invalid.

**7. Gifts 🔑28(2)**

Where mortgage and indebtedness secured thereby were assigned on condition that assignee should manage and control funds subject to assignor's directions paying income to assignor during her lifetime and upon her death funds should be property of assignee, valid gift was effected, notwithstanding reservation of right to income from property during assignor's lifetime.

**8. Gifts 🔑28(2)**

Where mortgage and indebtedness secured thereby were assigned on condition that assignee should manage funds subject to assignor's directions paying income to assignor during her lifetime and, upon her death funds, indebtedness and proceeds should be property of assignee, fact that assignee predeceased assignor would not affect right of assignee's children to claim property on ground that valid gift was completed.

**9. Gifts 🔑28(2)**

Where mortgage and indebtedness secured thereby were assigned on condition that assignee should manage funds subject to assignor's directions paying income to assignor during her lifetime and, upon assignor's death funds, indebtedness and proceeds should be property of assignee, fact that assignee's children made no active assertions of completed gift prior to death of assignee did not render gift invalid.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Edith M. Gordon, as executrix of the last will and testament of Julia A. Gordon, deceased, against Mary Robb Barr to quiet title to real and personal property, for an accounting and to compel a reconveyance of the property. From a judgment for the defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 82 P.2d 955.

J. E. Hood, of Oakland, and Conley, Conley & Conley, of Fresno, for appellant.

Samuel F. Hollins, of Fresno (Matt Wahrhaftig, of Oakland, of counsel), and McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

EDMONDS, Justice.

The question presented for decision in this case is whether Julia A. Gordon in her lifetime made a valid and completed gift of certain property to W. M. Barr, who was the respondent's father. The appellant, as executrix of the will of Mrs. Gordon, brought an action to quiet title to this property. She also sought an accounting for its use and a reconveyance. The superior court determined that title to the property had passed to the respondent by the gift to her father and his subsequent transfer of it and rendered judgment accordingly.

The evidence shows that Mrs. Gordon and Mr. Barr were first cousins and intimate friends. She lived in Oakland and he in Fresno county and for many years he managed the investment of $2,000 which she had entrusted to him for that purpose. With it he had purchased notes secured by mortgages on real property in Fresno county, the interest on which he remitted to her regularly for many years. Numerous letters, which they exchanged during this period, and which were received in evidence, show an unequivocal desire on her part that the property should eventually belong to him but that she receive the income from it during her lifetime. Whether this purpose ripened into a completed gift of the property to him during her lifetime is the precise point in dispute.

Originally the notes were taken in Barr's name and the documents of title were retained by him in his safe, together with an assignment in blank and a statement that the property belonged to Julia A. Gordon. In 1928 this practice was changed. During that year the original loan was paid off and two new loans of $1,000 each were made. One, which will be referred to as the Deaver mortgage, was made payable to Julia A. Gordon and was forwarded to her. The other, known as the Stewart mortgage, was taken in Barr's name.

About this time Mrs. Gordon wrote him concerning a plan, which she said was suggested by her attorney. Under it, she said, "you will get the two mortgages of $1,000 each at my death, which I want to know will go to you without fail". According to this plan she was to execute assignments of the notes and mortgages to him and place the assignments in her safe deposit box to be delivered to him at her death, and it was to be "understood that these assignments are not to take effect until my death". Mr. Barr's reply to this is not in evidence, but it may be inferred that he questioned the validity of such procedure, for in a subsequent letter to him Mrs. Gordon stated that she wanted to show his letter to her attorney, but had not been able to see him yet and that "All I care, Cousin Will, is to be sure that these mortgages come to you and to whom you want to have them after you and I are through with them."

Early in 1929 the parties were evidently still in disagreement as to the way Mrs. Gordon's wishes should be carried out, for at that time Mr. Barr wrote to her saying: "Neither myself or my attorney agree with yours, quite. I think that he will agree with us that under present conditions you will have a perfect right to do what you please with your property but I want to arrange this matter as you want it." The matter was still undetermined in June of that year when she wrote to him: "I had arranged in good shape everything five years ago and I thought when I had told you by word of mouth that I gave you those mortgages after I am gone that that was all that was necessary to complete the business. But it seems it is not legal, so all this red tape has to be gone through with. Of course, a lawyer wants things done in legal and proper form. Personally I don't care, only I want to be sure that the proceeds of these mortgages go to you, and after that to cousin Mary."

In October, 1929, Stewart was in default on his note and in lieu of foreclosure he agreed to convey the property to Barr and his wife (whom Mrs. Gordon called Cousin Mary), "subject to a mortgage of one thousand (dollars) to Julia A. Gordon which the grantees herein assume and agree to pay" and at the same time he executed a new note and mortgage in favor of Julia A. Gordon. Barr forwarded the note and mortgage to her, together with a blank assignment, and she had possession of both mortgages from that time until her death. However, a few days later she returned the executed assignment of the mortgage to him, saying "I am sending you my assignment of mortgage and if you wish the rest of the papers I'll send them". In a letter acknowledging receipt of this document he said: "I did not expect you to return the assignment to me. You see if I should record it now, it would put the mortgage back in my name and you would have no more to do with it. Unless you would rather hold it with the other papers I will hold it as it is, not recording it. It is not effective until it is recorded."

A few months later Mrs. Gordon executed and forwarded to Mr. Barr an assignment of the Deaver note and mortgage, and in March, 1930, he wrote to her saying: "I have not recorded the last assignment you sent me but will await developments." This assignment was recorded the following month and the assignment of the Stewart mortgage was recorded in January, 1931. Later in 1930, he wrote to her again, saying, "Do you want to sell the Stewart house or take a $500 payment on the Deaver house. I think we could do one or the other soon."

In 1931 the health of both parties had failed to such an extent that they ceased corresponding. Mr. Barr assigned the Deaver note to his daughter, the respondent in this case, and he and his wife also conveyed the Stewart property to her. The daughter continued to pay the income from the property to Julia A. Gordon until her death in 1934. Prior to that time the Deaver note was paid off, and Miss Barr reinvested the funds, taking a new mortgage to secure a note payable directly to herself. Concerning this she wrote to Julia Gordon: "On a separate sheet I am enclosing a statement of your loan and interest as near as I can figure it out. Tony [respondent's brother-in-law] has loaned the $1000 again."

At the trial Miss Barr testified that it was her understanding that Mrs. Gordon gave the property to her father, reserving only the income during her life and that her father considered the money a gift. Her brother-in-law testified to the same effect. However, in evidence are letters written by him following the death of Mr. Barr in which he refers to the funds as "Cousin Julia's money" and states: "We have several letters from Cousin Julia to Mr. Barr stating that when she passed away the principal of the investment should go to Mr. and Mrs. Barr. It was an act of fate that both Mr. and Mrs. Barr have preceded Cousin Julia in death, and this fact has necessarily complicated the matter to a great extent."

Upon this evidence the trial court found that the two notes and mortgages which Julia Gordon executed and delivered to W. M. Barr "were not, nor was either of them, delivered upon any condition whatsoever, except that said assignments were, and each of them was, delivered upon the express understanding and agreement that the said W. M. Barr should manage and control the funds invested in said mortgages, subject to the direction of the said Julia Gordon, during her lifetime, paying the income therefrom to the said Julia A. Gordon, for and during the term of her natural life and that upon the death of said Julia A. Gordon, the said funds, property and indebtedness, and all the proceeds thereof, should be and remain the property of the said W. M. Barr, his heirs and assigns, free and clear of any trust or obligation whatsoever". The court also found that W. M. Barr had transferred the notes, mortgages and land derived therefrom to the defendant in consideration of more than $4,000 advanced by her to him and concluded that defendant was the owner of the land and the note in question.

[1, 2] The appellant argues first that the judgment of the trial court is contrary to its findings. Specifically, it is claimed that the finding that the assignments were delivered upon the understanding "that upon the death of said Julia A. Gordon, the said funds, property and indebtedness, and all the proceeds thereof, should be and remain the property of the said W. M. Barr, his heirs and assigns, free and clear of any trust or obligation whatsoever" compels the conclusion that the parties intended that the gift should not take effect until Mrs. Gordon's death, and hence the delivery was ineffectual. But appellant's interpretation is piecemeal; she seizes upon one portion of the finding and ignores its context. This part of the findings does not mean that title should vest in Mr. Barr only upon Julia Gordon's death; it is entirely susceptible of the interpretation that upon the death of Julia Gordon the funds should be "free and clear of any trust or obligation whatsoever" and it should be construed in that way to support the judgment. Merner Lumber Co. v. Brown, 218 Cal. 136, 139, 21 P.2d 590; LaMar v. Bank of America Nat. Trust & Savings Ass'n, 218 Cal. 252, 256, 22 P.2d 689.

A further contention of the appellant is that the finding indicates that Mrs. Gordon did not part with the right of dominion over the property because the delivery was conditional; that is, it was made on the condition that Mr. Barr manage the investment subject to her direction and subject also to her right to the income during her life. This presents a more difficult question.

[3] The necessity for delivery in gifts of personal property has its genesis in the archaic doctrine of seisin. Brown on Personal Property, p. 76; 20 Col.L.R. 196; 21 Ill.L.R. 341. But in spite of the obsolete and formalistic character of its origin,

the requirement has salutary features which fully justify its retention in the law. It protects the property of the individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. Such a precaution is especially desirable when, as is frequently the case, the alleged donor is dead at the time the claim is asserted. Moreover, by requiring some positive act of relinquishment such as manual tradition of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property. See Mechem, The Requirement of Delivery in Gifts of Chattels, 21 Ill.L.Rev. 341, 457, 568, at 348 et seq.

In the light of these desiderata such vague terms as "constructive delivery", "symbolic delivery", and "parting with dominion and control" take on a new aspect and become more certain and explainable. Where there has been unequivocal proof of a deliberate and well-considered donative intent on the part of the donor, many courts have been inclined to overlook the technical requirements and to hold that by a "constructive" or "symbolic" delivery is sufficient to vest title in the donee. However, where this is allowed the evidence must clearly show an intention to part presently with some substantial attribute of ownership.

[4, 5] The California decisions often speak in terms of "absolute and unconditional delivery" and "transfer of complete dominion and control" (see Beebe v. Coffin, 153 Cal. 174, 94 P. 766; Knight v. Tripp, 121 Cal. 674, 54 P. 267), and yet a study of them shows that these terms are used only in a limited sense. As long as the donor's acts unequivocally show that he intended to divest himself of ownership in the property, the gift will be upheld. Thus, it has long been established that a donor may make a valid gift of property reserving to himself a life interest in, or a life income from, the property given. Calkins v. Equitable B. & L. Ass'n, 126 Cal. 531, 59 P. 30; Mercantile Trust Co. v. Reay, 96 Cal.App. 568, 274 P. 401. And it has been held that a gift of corporate stock is not invalidated even though given subject to the donor's right to vote the stock and collect the dividends. Lynch v. Lynch, 124 Cal.App. 454, 12 P.2d 741.

[6] Moreover, it has frequently been held that gifts in trust in which the donor reserves the right to revoke the trust are not invalid. Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; Drinkhouse v. German S. & L. Soc., 17 Cal. App. 162, 118 P. 953; Nichols v. Emery, 109 Cal. 323, 331, 41 P. 1089, 50 Am.St. Rep. 43; Tennant v. Tennant Memorial Home, 167 Cal. 570, 576, 140 P. 242; American Bible Soc. v. Mortgage Guar. Co., 217 Cal. 9, 17 P.2d 105. In the last case cited the donor attempted to make a gift by creating a revocable joint tenancy with right of survivorship in the donee. The gift was technically defective because the donee was a corporation, but the court gave effect to the donor's intention by holding that a valid trust in favor of the donee had been created.

[7] Under the law as established by these cases the court's finding to the effect that Julia Gordon reserved a right to the income from the property during her life and the right to a voice in its management is not contrary to the conclusion that the gift was complete and valid. Upon principle, the situation of the parties as stated in this finding cannot be distinguished from the facts upon which the case of Lynch v. Lynch, supra, was decided.

[8] Appellant also contends that the evidence shows that the donor intended that the gift take effect only upon her death and, therefore, does not support the judgment. It must be conceded that several of the letters written by Julia Gordon during the years 1928 and 1929 show an intent on her part to retain title to the notes and mortgages until her death, and the plan suggested by her attorney whereby she was to execute but retain the assignments during her lifetime would doubtless have been ineffectual. But that plan was not followed. Instead she executed and forwarded assignments of both mortgages to W. M. Barr at Fresno. One letter of transmittal is in evidence and it contains no conditions or restrictions whatsoever. No claim is made that the notes which she retained were of such character as to enable her to pass a good title notwithstanding the assignments, and it must, therefore, be assumed that the delivery and recordation of the assignments unqualifiedly divested the donor of title. Title having vested in W. M. Barr, the fact that he predeceased Julia Gordon cannot affect the respondent's rights.

[9] Nor is it material that neither the respondent nor her brother-in-law made any active assertions of completed gift prior to the death of Julia Gordon. This evidence bore to some extent upon the credibility of the direct testimony of these two persons at the trial but the trial judge chose to credit their testimony. There is substantial evidence to support the judgment in favor of the respondent and it should, therefore, be upheld.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; HOUSER, J.; LANGDON, J.; SHENK, J.

13 Cal.2d 424

**MERIDIAN, Limited, v. CITY AND COUNTY OF SAN FRANCISCO et al.**

**Sac. 5088.**

**Supreme Court of California.**

**June 3, 1939.**

**Rehearing Denied July 1, 1939.**

**Appeal and error 🔑832(1)**

**In action against city to quiet title to water rights and enjoin diversion of waters of river, contention that judgment as modified did not accord to plaintiff adequate protection of its rights nor direct a physical solution, and that rehearing should be granted so that parties might, after further opportunity for consultation, arrive at a permanent agreement to be embodied in a possible stipulated judgment, was without merit, where nothing in judgment as modified would prevent trial court from providing a physical solution or from making further orders in protecting rights of parties, and trial court's reservation of jurisdiction was not affected by Supreme Court's decision.**

In Bank.

Appeal from Superior Court, Stanilaus County; Raglan Tuttle, Judge.

On petition for rehearing. Petition denied.

Prior opinion, 90 P.2d 537.

Rehearing of modification of judgment denied; SEAWELL, Acting C. J., and EDMONDS, J., dissenting.

Sloss, Turner & Finney, of San Francisco, and Murray Bourne, of Fresno, for plaintiff, respondent and appellant Meridian Ltd.

W. C. Le Hasse, of Modesto, amicus curiae for John C. Whaetley and others.

John J. O'Toole, City Atty., City and County of San Francisco, Dion R. Holm, Asst. City Atty., and A. E. Chandler, Sp. Counsel, all of San Francisco, for defendant, appellant and respondent City and County of San Francisco, etc.

Allen G. Wright and Robert M. Searls, both of San Francisco, amici curiae for San Francisco Chamber of Commerce.

PER CURIAM.

On petition for rehearing the plaintiff calls attention to an obvious omission in the modification of paragraph IV of the judgment. In that paragraph the trial court, among other things, definitely fixed the extent of the city's prescriptive right. The city also suggests a correction to the same effect. The purpose of the suggested or any modification of paragraph IV was and is to retain in the judgment the determination of the trial court with reference to the city's prescriptive right and to eliminate therefrom the restriction against the increased storage by the city within that right. The opinion and judgment of this court is therefore modified by striking therefrom the quoted paragraph following the words "Paragraph IV is modified to read as follows:" (appearing on page 537 of 90 P.2d), and substituting in lieu thereof the following:

"That the defendant, the City and County of San Francisco, is the owner by prescription of a right, prior and superior to the plaintiff's riparian right, to store in its Lake Eleanor Reservoir and Hetch Hetchy Reservoir the waters, including the excess waters, of the Tuolumne River and its tributaries, up to 234,000 acre feet of water, and no more, at any one time, and up to a total of 235,465 acre feet of water, and no more, in any seasonal year, extending from and including October 1st of any year to and including September 30th of the next succeeding year, and to release the water so stored and use it for the generation of hydro-electric power; provided that when there is not flowing at the plaintiff's land the quantity of water to which it has been found to be entitled, and of a quality substantially unimpaired by any act of the city beyond the exercise of its prescriptive right, the waters so stored and then being used for power purposes shall be returned after such use to the Tuolumne River at a point above the works of the defendant, Turlock Irrigation District, Modesto Irrigation District and Waterford Irrigation District, and above the lands of the plaintiff."

It is further urged by the plaintiff that the judgment as modified does not accord to the plaintiff adequate protection of its rights, nor direct a physical solution, and that a rehearing should be granted so that the parties might, after further opportunity for consultation and study, arrive at a permanent agreement to be embodied in a possible stipulated judgment. There is nothing in the judgment as modified herein which would prevent the trial court from providing a physical solution in carrying out the purpose and intent of the judgment, or from making further orders in protecting the rights of the parties. The trial court has safeguarded its jurisdiction in that respect by the reservation contained in paragraph IX of the judgment as follows: "That the court hereby reserves jurisdiction and authority, at any time, and upon application of any party affected by this judgment and decree, to make such modifications of, or such additions to, the provisions of this judgment, or to make such further orders, as may be necessary for the adequate enforcement, protection or preservation of the rights of the respective parties as declared in this judgment." This paragraph of the judgment has been in no wise affected by the decision of this court and is left undisturbed.

The petition for rehearing is denied.

13 Cal.2d 584

## ZOLKOVER v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 17080.

Supreme Court of California.

May 29, 1939.

As Modified on Denial of Rehearing June 27, 1939.

**1. Workmen's compensation 🔑1939**

The Industrial Accident Commission's implied finding that facts concerning employee's injuries as testified to by employee were true was binding on the Supreme Court.

**2. Workmen's compensation 🔑1877**

A petition for review of compensation award filed in the District Court of Appeal on the 30th day after Industrial Accident Commission's decision on rehearing was not filed too late. St.1917, p. 875, § 67(a).

**3. Workmen's compensation 🔑718**

Any ordinary risk to which employee was subjected while getting a spool of thread for his employer from another store and which resulted in injury was chargeable to industry and was compensable.

**4. Workmen's compensation 🔑693, 718**

Where employee who was sent by his employer to obtain thread from adjoining store was slashed by a Mexican who had been attempting to steal shirts and was fleeing from store, and employee gave chase, caught up with Mexican, held him until police arrived, and received additional cuts in attempting to take knife away from him, injuries inflicted in store and those inflicted during scuffle in street were compensable as "arising out of and in the course of employment."

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

**5. Workmen's compensation 🔑691**

Where the Industrial Accident Commission concludes that an assault on an employee commenced at a time and place which would make the resulting injury compensable, and the assault continued under circumstances justifying conclusion that assault was a continuing one, entire injury may properly be held to be compensable as resulting from a single assault.

CURTIS and HOUSER, JJ., dissenting.

In Bank.

Proceeding on a writ of review by Shy Zolkover, doing business under the fictitious firm name and style of Young's Men Shop, employer, and the National Automobile Insurance Company, insurance carrier, to annul an order of the Industrial Accident Commission granting compensation to Harry F. Robinson, employee, under the Workmen's Compensation Act.

Award affirmed.

C. W. Bowers, of Los Angeles, for petitioners.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent.

Hearing denied by Supreme Court; EDMONDS and HOUSER, JJ., dissenting.

SHENK, Justice.

The petitioners seek an annulment of the order of the Industrial Accident Commission, granting compensation to the applicant, Harry F. Robinson.

[1] Robinson was employed by Shy Zolkover as a salesman in a store dealing in men's wear and furnishings in the city of Los Angeles. About 11 o'clock on the morning of July 13, 1937, Robinson was sent by his employer to obtain some grey thread from Mr. Weiner's Army and Navy Store adjoining. Robinson testified before the commission that while he was in the latter store he observed Mr. Weiner had hold of a Mexican by the hair; that the Mexican was attempting to steal shirts; that Robinson saw the Mexican pull a knife; that he warned Weiner to "look out"; that Weiner loosed his hold on the Mexican who fled from the store, slashed at Robinson as he went by, cutting the index finger of his left hand. Robinson gave chase. He observed that the Mexican stabbed another bystander, cutting him in the abdomen. Robinson caught up with the Mexican and held him until peace officers arrived, receiving additional cuts on the fingers of his left hand while attempting to take the knife away. The commission's implied finding that the above facts are true is binding on this court. In its first order the commission concluded that the injury sustained by the employee to the index finger of the left hand was an injury arising out of and occurring in the course of the employment. On June 1, 1938, it awarded compensation based on permanent disability of 3¾ per cent, entitling the employee to $18.52 a week for fifteen weeks, or a total sum of $277.80.

The employer and his insurance carrier petitioned for a rehearing on the ground that the evidence did not warrant the finding that any injury occurred while the employee was in Weiner's store and that none of the alleged injuries arose out of the employment. The petition was denied on August 20, 1938, but at the same time the commission, on its own motion, opened the case for a rehearing on the question whether both injuries were compensable, namely, the injury inflicted in the store as to which compensation was awarded by the order of June 1, 1938, as well as the injury inflicted during the scuffle in the street.

The commission, on September 13, 1938, made another order whereby it set aside its first order, and concluded that both injuries were compensable. It thereupon awarded $18.52 a week for sixty-one weeks, a total of $1,129.72, based on 15¼ per cent of permanent disability. Subsequently the commission amended its order to provide for an award of $18.52 a week for thirty weeks based on 7½ per cent of permanent disability.

[2] There is no merit in the contention that the petition for review was filed too late. It was filed in the District Court of Appeal on October 13, 1938. Inasmuch as it was filed on the 30th day after the decision on rehearing, it was within the time prescribed by section 67(a) of the Workmen's Compensation Act, St.1917, p. 875.

The question for determination is whether any of the injuries sustained by the employee arose out of and occurred in the course of the employment.

The commission takes the position that both stabbings were a part of the res gestae; that there was such a close sequence of events between the first assault and the second stabbing that it is "impossible fairly to split this activity into parts, and they must be regarded as part of the same transaction. An industrial assault remains an industrial assault so long as events occur in continuous sequence without opportunity for reflection. If the injury from the first assault herein is compensable, the second one is also compensable."

[3-5] It is the petitioners' contention that the employee was performing no service for his employer at the time he was injured, and that therefore neither injury was one which arose out of and occurred in the course of the employment. We observe, however, that the employee was serving his employer when he went to the store to obtain a spool of thread. Any ordinary risk that he was subjected to while performing that service and which resulted in injury would be chargeable to industry and be compensable. That the employee was serving his employer at the time he received the first cut from the knife of the Mexican assailant must be deemed concluded by the decision in Frigidaire Corp. v. Industrial Accident Commis-

sion, 103 Cal.App. 27, 283 P. 974, and the cases therein cited.

The petitioners rely upon such cases as San Francisco & Sac. Ry. Co. v. Ind. Acc. Comn., 201 Cal. 597, 258 P. 86; Northwestern Pac. R. Co. v. Ind. Acc. Comn., 174 Cal. 297, 163 P. 1000, L.R.A.1918A, 286; Pacific Indemnity Co. v. Ind. Acc. Comn., 27 Cal.App.2d 499, 81 P.2d 572 (July, 1938); Jenks v. Carey, 136 Cal.App. 80, 28 P.2d 91; and Lumbermen's Mutual Casualty Co. v. Ind. Acc. Comn., 134 Cal. App. 131, 25 P.2d 22, wherein it was held under the particular facts of each case that the employee had not shown that at the time he sustained injury he was on an errand for his employer or engaged in an act within the scope of his duties. None of those cases involves facts as to which the rule invoked by the commission could be made applicable. Nevertheless the petitioners seek the application of the general rule there recognized, that an injury sustained while voluntarily doing something outside of the employment is not an injury suffered in the course of the employment. It is argued that even though, under the Frigidaire case, it be considered that the first injury is compensable, the additional injuries inflicted on the employee after he followed the Mexican into the street and attempted to take the knife from him, were the result of a voluntary act without the scope of the employment and could have no connection therewith.

The commission on the other hand argues the applicability of the decisions in Field v. Charmette Knitted Fabric Company, 245 N.Y. 139, 156 N.E. 642, and Pendl v. Haenel, 229 App.Div. 52, 241 N.Y.S. 59. In the first of these cases, Field, superintendent of a mill, ordered a knitter, Magid, discharged for unsatisfactory work. Words and threatening gestures ensued between the two men. After closing time Magid waited for Field in the street a few feet from the door of the mill. When Field came out Magid struck him a blow which caused him to fall backward and fracture his skull, and from which he died. A similar argument was there presented in resisting a death benefit award, the contention being that because the injury was inflicted while the men were on the street, the resulting death did not flow from any industrial hazard. In that case it was said [245 N.Y. 139, 156 N.E. 643]: "We think the line of division is drawn too narrowly and closely when circumstances of place are thus considered to the exclusion of all others. The quarrel outside of the mill was merely a continuation or extension of the quarrel begun within. * * * The situation would be hardly different if a struggle, begun back of the threshold, had ended in a fatal blow delivered on the walk. No reasonable opportunity had been offered the assaulted man to separate himself from the plant, its animosities and dangers. Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one."

It is true that in that case the court thus reasoned in applying the rule that an employee was entitled to a safe retreat from the premises of his employer. However, in the present case the assault commenced on premises which must be considered to have been the proper location for the discharge of the duty which Robinson was sent to perform. If at the time of the first injury Robinson had grappled with his assailant and attempted to disarm him while still within the four walls of the premises, it could not be said that additional injuries so received would not be compensable. As the facts in Field v. Charmette Knitted Fabric Co., supra, demonstrate that the same assault may be continuous and be carried outside of the premises, the facts in the present case lead to the conclusion that the sequence of events occurring without opportunity for reflection formed a part of the res gestae and constituted one continuous assault. The reasoning of the decision of the New York Court of Appeals was followed in the case of Pendl v. Haenel, supra, wherein the decedent, a janitor, was stabbed by a negro whom he found loitering about the employer's premises and had pursued some 150 feet into the street.

It is to be expected that cases wherein the foregoing reasoning may apply will differ on the facts. The point where spontaneity ceases and reflection commences indicating a departure from the field of industrial hazard is a question of fact for the commission to determine. When the fact-finding body may conclude, as the commission did in this case, that the assault commenced at a time and place which would make resulting injury compensable, and such assault continued under circumstances which would justify the conclusion that the assault was a continuing one, the entire injury may properly be held to result from a single assault. Such a case appears to have been presented to the commission in this proceeding. The award based on 7½ per cent of permanent disability was therefore within the proper exercise of its jurisdiction.

The award is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.

CURTIS, Justice (dissenting).

I dissent. I agree with the opinion in awarding compensation for the injury sustained by the employee while in the store where his employer had directed him to make a purchase. I cannot agree, however, with the majority opinion holding that the employee was entitled to an award for the injury sustained by him after he had left the store and was in pursuit of his assailant. The facts of this case bring it clearly under the rule announced in Northwestern Pac. R. Co. v. Industrial Accident Commission, 174 Cal. 297, 306, 163 P. 1000, 1003, L.R.A.1918A, 286, and kindred cases cited in the majority opinion, which hold that: "When a servant of his own accord and without the direction of his master steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters and is not liable for any injury received."

I can see but little resemblance in the facts in this case and the case of Field v. Charmette Knitted Fabric Company, 245 N.Y. 139, 156 N.E. 642, 643. In that case the superintendent of a mill had some words with an employee a few minutes before closing time. The employee waited outside of the mill, and as the superintendent stepped out of the mill, he was struck in the face by the employee. The court held that: "Here, almost in the very act of putting his foot without the mill, the employee is confronted by a danger engendered by his work within. The situation would be hardly different if a struggle, begun back of the threshold, had ended in a fatal blow delivered on the walk. No reasonable opportunity had been offered the assaulted man to separate himself from the plant, its animosities and dangers." What similarity can there be in those facts and the facts in the present case?

In the case now before us, the injured employee when he left the store was in no danger whatever. He not only had reasonable opportunity to separate himself from the dangers within the store, but the dangers within the store had ceased to exist. He then exposed himself to a further danger, not only outside, but some distance from the store in which he received his first injury. He thereby stepped outside the scope of his employment, and was at a place where his master owed him no duty as to the dangers there encountered.

The case of Pendl v. Haenel, 229 App. Div. 52, 241 N.Y.S. 59, 60, is equally ineffectual to take the present case out of the general rule which denies compensation to an employee for an injury received by him outside of his employment. In the Pendl case, the injured party was the superintendent of the building in which he found a negro wandering around in the basement who had exhibited a knife and frightened the superintendent's wife, and then fled from the building. The superintendent pursued the negro and was stabbed by the latter some one hundred and fifty feet from the building. The court held: "We are not to determine whether the pursuit was negligent or even sensible, but only whether it was in connection with the master's business. Decedent had to deal with a vicious criminal who came into building of which he was superintendent. Persons lawfully there might be injured, or the property of his employer destroyed or stolen. The intruder might have had a design to ascertain the plan of the interior of the building in preparation for a later burglarious or felonious entrance. The continuation of the pursuit for one hundred and fifty feet beyond the basement door was not an abandonment of the employment." In that case the pursuit of the intruder by the superintendent outside the building was held to have been made "in connection with the master's business", as it was done for the purpose of protecting his employer's property. In the instant case, it cannot be said that the pursuit by the injured party had any connection with or relation to the property of his master. Whatever may have been the purpose of the pursuit, it was wholly disassociated from the interests or property of the master. The Pendl case fails to furnish any exception to the general rule that when a servant of his own accord steps outside the scope of his employment, the master is not liable for any injury received by the servant while acting beyond the scope of his employment.

I concur: HOUSER, J.

13 Cal.2d 603

## LONGWAY v. NEWBERY et al.

L. A. 15892.

Supreme Court of California.

June 2, 1939.

**1. Vendor and purchaser ⟹39**

Where contract for sale of land is made by reference to an unrecorded map, contract is void and vendee may recover money paid thereunder, notwithstanding that he knew map was unrecorded. St.1907, p. 290.

**2. Limitation of actions ⟹28(1)**

Unless equitable considerations excuse delay, statute of limitations may bar recovery of purchase price paid under contract for sale of land made by reference to an unrecorded map. St.1907, p. 290.

**3. Limitation of actions ⟹60(5)**

Where purchaser knew that map was not recorded at time he purchased land, and eight years elapsed since purchase, right to maintain action for rescission on ground that contract for sale of land was made by reference to an unrecorded map and was void, was barred. St.1907, p. 290.

**4. Vendor and purchaser ⟹341(1½)**

Where nonresident bought land relying on representation of trustee's agent that improvements would be installed without cost to purchaser and trustee under subdivision trust in letters to purchaser represented that improvements would be, or had been, installed, trustee to whom owner assigned his interest could not escape liability in purchaser's action to rescind contract on ground of fraud, on ground that it repudiated any promise made by the owner with regard to the installation of improvements.

**5. Vendor and purchaser ⟹341(1½)**

A trust company, or one who holds legal title to land, becomes principal and those who actually sell land for such principal are its agents, and it is liable for their representations on the theory of unjust enrichment.

**6. Limitation of actions ⟹95(1)**

Where nonresident in 1926 bought land relying on representations of trustee's agents that improvements would be installed without cost to purchaser, and trustee under a subdivision trust obtained payments from purchaser and represented that improvements would be, or had been installed on which representation the purchaser relied, purchaser's suit in 1934 to rescind purchase was not barred by limitations.

**7. Vendor and purchaser ⟹120**

Where purchaser seeking to rescind purchase of lots gave formal notice of rescission, to trustee from whom purchase was made, and to owner, and demanded return of money paid for lots, and offered to return and tendered return of everything of value he received under contract, together with quitclaim deed in favor of the trustee, purchaser adequately complied with statutory provisions relating to rescission of contracts. Civ.Code, § 1691.

**8. Vendor and purchaser ⟹341(1½)**

Where nonresident bought land relying on representations of trustee's agents that improvements would be installed without cost to purchaser, and trustee under subdivision trust obtained payment from purchaser and represented that improvements would be, or had been installed, and took assignment of owner's interest in the trust, owner's wife who received no benefit from the trust and had no contractual relations with purchaser could not be held liable in purchaser's action for rescission.

**9. Vendor and purchaser ⟹341(6)**

Where nonresident bought land relying on representation that improvements would be installed without cost to purchaser, who in making purchase dealt with agents of trustee holding legal title under a subdivision trust, and owner subsequently assigned his interest to the trustee which represented in letters to purchaser that improvements would be or had been installed, in suit for rescission on ground of false representations concerning making of improvements, judgment against trustee would not be confined to specific subdivision trust only, where it did not appear that trustee did not still possess assets available to satisfy judgment.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Claude J. Longway against Cad M. Newbery and others for rescission, and for money had and received. From a judgment for defendants, plaintiff appeals.

Reversed in part, and in part affirmed.

Prior opinion, 80 P.2d 529.

J. K. Wilson, of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondent Cad M. Newbery.

Arch Vernon, Earl E. Johnson, and Lawrence L. Otis, all of Los Angeles, for respondent Title Insurance & Trust Co.

PER CURIAM.

A hearing was granted in this court after decision by the District Court of Appeal, Third Appellate District, in order to give further consideration to the question relating to the liability, if any, of the defendant, Cad M. Newbery, and also to the question of the sufficiency of the evidence to support certain of the findings made by the trial court.

From a judgment in favor of the defendants in an action for rescission, the plaintiff has appealed.

There was no substantial conflict in the evidence. The uncontradicted facts surrounding the purchase of two lots by plaintiff were as follows: That he was a resident of the state of Michigan and, during a visit to California in November, 1926, he purchased two lots in an unimproved tract of land located near the town of San Fernando, in Los Angeles county; that he visited the tract on November 22d; and that at that time and place he discussed the terms of purchase of the lots with the sales agents Johnson, Langmo and a Mrs. Ward, who told plaintiff that improvements, consisting of the installation of cement pavements, cement sidewalks and curbs, gas, water and electricity, would be made in connection with each lot, at no cost to the purchaser.

The record shows that the tract of land was owned by one C. W. Newbery, but that the legal title thereto was held in trust (No. S-7334) by the defendant Title Insurance and Trust Company, as trustee, under a subdivision trust wherein said Newbery was the beneficiary. By the terms of section two of the trust it was provided that after payment of trustee fees and expenses, and of commissions to sales agents for the sale of the lots, a certain percentage of the proceeds received therefrom was to be placed in an "Improvement Fund" and that the distribution of moneys to the "improvement fund" should continue until the trustee was furnished with evidence of the installation of all the improvements intended to be made to the real property covered thereby, and of the payment in full of all costs and expenses thereof. The record further shows that prior to the sale to plaintiff, and pursuant to its powers under the trust, the trust company employed the Howard Marr Organization, Inc., a realty firm, as its selling agent for the tract of land, and that sales agents Johnson, Langmo and Mrs. Ward, who dealt directly with plaintiff concerning the terms of the sale of the lots, were the employees of the realty company. It further appears that in the agency agreement made between the trust company and the realty company for the sale of the lots in the tract, it was provided that the realty company should have "the general care and custody of the above described property with authority to solicit and obtain purchasers therefor and to arrange the prices and *terms of sale*". (Emphasis added.) It also was provided in the agency agreement that "all of the acts, however, of said agent shall be subject to the approval and confirmation of said principal".

At the time plaintiff purchased the lots, on November 22, 1926, he paid to the trust company, through its sales agents, the sum of $4,270, being the full purchase price of the two lots which had been described to him as was indicated on an unrecorded (blue print) map as lots 11A and 11B, and received therefor a written receipt for the purchase price of each lot, in which each lot was referred to as being a part of tract No. 9179 of a *recorded* plat. The receipts also contained the following statements: "Trust No. S-7334 provides for the installation of the following improvements: sidewalks, curbs, streets, electricity, gas and water at no cost to purchaser".

The record also shows that a week after plaintiff had purchased the lots, and on November 29, 1926, *C. W.* Newbery assigned and transferred his entire beneficial interest in the said trust to the trust company as security for the performance by said Newbery of the obligations undertaken by him, as set forth in the trust, to install the improvements, "subject, however, to all terms and conditions of said * * * trust". It also was provided therein that upon the default of said Newbery in the erection and completion of the improvements he would pay to the trust company such amount of money as would enable the trustee to effect the construction of the improvements.

Thereafter the trust company sent to plaintiff in Detroit two deeds dated November 26, 1926, labeled respectively, on the outside of each, as "Lot 11A" and "Lot 11B"; but in the body of the deed labeled

"Lot 11A", the property was described as the northeasterly twenty-five feet of lot 11, tract 9179, sheets 1 and 2, as per map recorded, etc., and the property covered by the deed labeled "Lot 11B" was referred to in the body thereof as all of lot 11 in tract No. 9179, except the northeasterly twenty-five feet thereof, etc.

Some few months after his return to Detroit, plaintiff learned that the improvements to the property were not being installed. He wrote to the trust company and to said Newbery with regard thereto, and thereafter various letters relating to the installation of the improvements were exchanged between plaintiff and the trust company, on the one hand, and between *C. W.* Newbery and plaintiff, on the other, until the death of said Newbery in May, 1933, and thereafter the correspondence was carried on between his widow, *Cad M.* Newbery, and plaintiff. The letters disclosed that plaintiff had been charged with the payment of an assessment, which had been levied against the property by the city of Los Angeles for a street bond covering Sayre avenue, upon which street plaintiff's two lots abutted, and that plaintiff had paid the same. The correspondence also referred to the proposal to charge plaintiff the sum of $591.28 (payable over a period of years) asserted to be his proportionate share of charges assessed against the tract of land by the city of Los Angeles in connection with the installation by the city of a water system for that district. The correspondence further shows that although plaintiff paid certain moneys in connection with the water assessment, he protested the payment of the same for the reason, asserted by him, that at the time he purchased the lots, it was understood that installation of the improvements would be "at no cost to" him. Several letters were exchanged regarding the charges for the installation of water, and it appears that, up to the time the action was brought, in July, 1934, negotiations were being had with a view to refunding moneys paid by plaintiff for such charges. Plaintiff testified that at or shortly prior to that time he learned that, except for the installation of sidewalks, no improvements had been made on the tract.

Appellant contends that he is entitled to rescind the contract and recover his money because of the alleged false representations made by defendants, or their agents, that they would install the improvements, and their subsequent failure to do so; and also that he was entitled to the return of his money in that the offer for sale and the sale of the lots were made by reference to an *unrecorded* map, as prohibited by Statutes 1907, page 290, as that statute read at the time of the sale here involved.

[1-3] Regarding the latter contention, on each of several occasions it has been held by respective appellate tribunals of this state that, under the provisions of Statutes 1907, page 290, where a contract for the sale of land is made by reference to an unrecorded map, such contract is void, and that a vendee may recover his money paid thereunder. Goodspeed v. Associated Almond Growers, 208 Cal. 121, 280 P. 530; Silverthorne v. Percey, 120 Cal.App. 83, 7 P.2d 746; Cook v. La Vina Land Co., 3 Cal.App.2d 21, 39 P.2d 458; Smith v. Bach, 183 Cal. 259, 191 P. 14. In other cases it has been held that recovery might be had under those circumstances, notwithstanding the fact that the vendee knew that the map was unrecorded. Hubbard v. Turner, 110 Cal.App. 358, 294 P. 465; Kozlowski v. Adams, 102 Cal.App. 578, 283 P. 365; Harris & Hull v. McCarty, etc., Corp., 102 Cal.App. 461, 283 P. 111. However, it also has been held that unless equitable considerations excuse the delay, the statute of limitations bars recovery of the purchase price. Smith v. Bach, 53 Cal.App. 63, 199 P. 1106; Pickford Company [Mary] et al. v. Bayly Bros. Inc. et al., Cal.Sup., 86 P.2d 102. In the instant case, it appears that plaintiff knew that the map was not recorded at the time when he purchased the land. That being so, considering the time that had elapsed since the purchase, the right to maintain the action on that ground is barred.

With regard to the other question presented, i. e., whether the evidence was sufficient to support the finding of the trial court that no false representations were made, the appellant contends that the finding on this issue was without support in the evidence.

In part the trial court found as follows: That the trust company was the trustee in an agreement wherein C. W. Newbery was the beneficiary, but that the latter had no interest in the trust at the time of his death; that the plaintiff had entered into an agreement for the purchase of the lots, described upon an unrecorded map as lots 11A and 11B, and paid to the trust company the full purchase price therefor; that both the receipts and Trust No. S—7334 provided for the installation of specified improvements at no cost to the purchaser; that with the exception of sidewalks, substantially none of the other improvements had been made, and that the defendants had not advised plaintiff that the remainder of the improvements could not and would not be installed by them. However, in respect to those improvements which had not been made, the trial court also found that no false representations in that regard had been made by the defendants, their agents, or any of them, and that any representations that had been made at any time in connection with the installation of said improvements were believed by the makers or maker thereof to have been true, and that said or any representations were not made with intent to deceive plaintiff; that it was not true that plaintiff discovered in 1934, and for the first time, the improvements had not been made, but that in 1927 plaintiff was informed that a part of said improvements had not been made; and that the action was barred by various statutes of limitations.

It is against the findings last hereinabove set forth that the appellant's attack is directed as being without support in the evidence. As hereinbefore has been stated, in part, the testimony of plaintiff was that certain representations were made to him by agents of the trust company prior to his payment of the purchase price, to the effect that the improvements would be installed. Not only was that testimony uncontradicted, but, of the four persons allegedly present at the time the representations in question were made, the agents Johnson and Langmo were in court at the time of the trial and each corroborated the statements of plaintiff in that regard. Appellant contends the rule is that an intent to defraud may be inferred from the facts and circumstances shown in the case (citing Wilson v. Rigali & Veselich, 138 Cal. App. 760, 33 P.2d 455), and that, considering all the facts and circumstances here shown to be present, particularly the import of certain of the letters which he received from the trust company and from *C. W.* Newbery, together with *the actual failure to install all the improvements*, there was evidenced on the part of the defendants at the time of purchase, an intent to deceive the plaintiff by the promise to install the improvements; that the statements made by the trust company and *C. W.* Newbery in their letters to him lulled him into a sense of security, situated as he was, several thousand miles from the property in question; that in reliance upon those letters he was entitled thereafter to believe that at least some of the improvements had been installed and that the remainder would be; and that under those circumstances the statute of limitations would not commence to run, in fact, until he had learned that all the improvements had not been and would not be installed.

The first letter written by plaintiff to the trust company was in October, 1927, in which he stated that he had been told no improvements were being made on the tract. Shortly thereafter the trust company replied: "It is our understanding Mr. Newbery caused certain promises to be made with reference to the installation of improvements in the said Tract, which improvements have not yet been installed. We notified Mr. Newbery several days ago that this Company would expect him to take immediate action to make the said improvements and it is hoped that he will commence work within the very near future."

In another letter from the trust company to plaintiff in April, 1928, the trust company said, "The Beneficiaries under both of the said trusts agreed to install sidewalks and public utilities at their own cost * * * Our reports indicate that most of these improvements *have been fully installed* and the beneficiaries in both Trusts *are bonded* to fully complete the improvements according to their promises. * * *" (Emphasis added.)

Also, in April, 1928, *C. W.* Newbery wrote to plaintiff: "We have been very busy installing our improvements, and I regret very much that you cannot come to California at this time, since the tract now presents a very pleasant appearance, and I am sure that you would be pleased with the present situation, and our prospects for the future."

In the case entitled Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.2d 455, 457, relied upon by appellant, the plaintiffs bought two lots in the city of Burbank, California. Certain representations were made to the vendees to induce the purchase of the lots, one of which was that the installation of water, electricity, and all street improvements would be commenced shortly. The improvements were not made in accordance with the representations, although the defendants continued to make statements implying that they would be; and ultimately an action was brought by the plaintiffs for cancellation of the contracts. In upholding the judgment in favor of the plaintiffs, the court said: "The intention not to perform a promise is a matter of inference from the facts proven and subsequent conduct may be sufficient to show such intention. Snyder v. City Bond & Finance Company, 106 Cal.App. 745 [289 P. 859]; Bouey v. Porterfield, 96 Cal.App. 674 [274 P. 766]. * * * Without the consideration of other evidence, *the subsequent failure to perform* warrants the inference that appellants *did not intend to perform* when they promised." (Emphasis added.) To the same effect see Estate of Barrow, 27 Cal. App.2d 402, 405, 80 P.2d 1006, and Cox, Executor, v. Klatte, Cal.App., 84 P.2d 290, 295. In the case last cited it also was said, "* * * The making of a promise without intent to perform it constitutes fraud (Civ.Code, sec. 1572, subd. 4; Wilson v. Rigali & Veselich, supra) and in such a case, the proof of a single fraudulent representation is sufficient to support the judgment, and without the consideration of other evidence, the *subsequent failure to perform* warrants the inference that appellants did not intend to perform when they promised (See Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 289 P. 859; Bouey v. Porterfield, 96 Cal.App. 674, 274 P. 766)." (Emphasis added.)

The case of Greenberg v. Du Bain Realty Corp., 2 Cal.2d 628, 42 P.2d 628, presents a factual situation analogous to that in the instant case. There the plaintiff bought two lots in 1923, while in California, from the defendant realty corporation, through its agents. Plaintiff lived in New York, and shortly after making the agreement to purchase the lots, he returned thereto and did not again visit California until in October, 1931. During that period he wrote to the defendants, asking them to install certain improvements represented by them to be a part of the consideration for the purchase by him of the lots. The replies led the plaintiff to believe that the defendants would install the improvements, and the plaintiff continued to make payments on the purchase price of the lots. Upon his return to California in 1931, plaintiff learned that the improvements had not been installed and thereupon notified the defendants of the rescission of the contract, and brought an action therefor. In sustaining a demurrer to the complaint, the trial court held that the plaintiff was not entitled to rely upon the alleged fraudulent representations of the sales agents because of a stipulation contained in the contract limiting the agents' authority and, further, that the action was barred by the statute of limitations. In reversing the judgment, this court held that notwithstanding the attempted limitation of liability on the part of the principal, the latter was liable on the theory of unjust enrichment—the money retained by the principal being held by it as a constructive trustee for the person defrauded—in accordance with the rule stated in the case of Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760; and that the action was not barred either by laches or by the statute of limitations. See, also, Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736.

In the instant case there was no *direct* evidence of an intention on the part of the defendants not to perform, but counsel for the defendant trust company concedes that "there was a breach, it is true, in the provisions of the declaration of trust and the agreement of Mr. Newbery for the installation of the improvements". The defendant trust company argues that the duty of installing the improvements rested upon *C. W.* Newbery, in accordance with the terms of Trust S—7334, and not upon the trust company. It also relies upon the asserted fact that in its letter to plaintiff, dated October 13, 1927, it informed plaintiff, in effect, that it had "repudiated any obligation to cause the improvements to be made, had not authorized anyone to make any such promise, but hoped that the improvements promised to be made by *Mr. Newbery* would be installed". (Emphasis added.)

[4, 5] Under the rulings in the decisions hereinafter cited, the trust company may not evade liability by relying on such an assertion, if in fact it had been made. It would be liable not only for the representations of its agents made at the time of the sale to plaintiff, but also for its own representation set forth on the receipts which plaintiff received, to the effect that the trust provided for the installation of the improvements. In this regard see: Weiner v. Roof, 10 Cal.2d 450,

74 P.2d 736; Graham v. Los Angeles First N. T. & S. Bk., 3 Cal.2d 37, 43 P.2d 543. A trust company, or one who holds the legal title to land becomes itself a principal and those who actually sell the land for such principal are its agents, and it is liable for their representations on the theory of unjust enrichment. Graham v. Los Angeles First N. T. & S. Bk., 3 Cal. 2d 37, 43 P.2d 543, 546. In the case last cited, which was an action for rescission of a contract for alleged fraudulent representations made in connection with the purchase of real property, the corporate defendant held the legal title to the land, as trustee, the beneficiaries being the sellers of the land. Representations were made to the plaintiffs by one of the defendants to the effect that certain improvements would be installed, and upon learning that they were not so installed, the plaintiffs brought the action to rescind. The trial court sustained a demurrer to the complaint filed by the defendant bank. In reversing the judgment this court said: "Although the complaint does not state that the bank as trustee holds funds for or is indebted to the beneficiaries, yet it does set forth the fact that the bank *holds legal title* to the real property in trust for the beneficiaries, that the purchasers entered into the agreement with the bank *as holder of the legal title,* that they paid over to the bank on the purchase price of said lot the various sums set out in said complaint, that they had made a demand upon the bank for a return of said purchase price, and that said demand had not been complied with. These allegations are sufficient to render the bank liable, *at least in its relation as trustee,* for the repayment of the purchase price received by it." In so holding, the court in that case further said: "Equally untenable is the contention of the respondent bank that inasmuch as the representations were not made by it, but by the individual respondents, the beneficiaries who were also the sellers, and the complaint contains no allegation that the respondent bank has the money of or is indebted to said beneficiaries, the complaint fails to state a cause of action against respondent bank to recover the money paid on the contract. Since the bank held legal title to the real property which the plaintiffs agreed to purchase, it follows that in the negotiations of purchase and sale relating to the real property, *the bank stood in the position of principal and the beneficiary-sellers stood in the position of agents.* It is now settled by the recent cases of Speck v. Wylie, 1 Cal.2d 625 [36 P.2d 618, 95 A.L.R. 760]; Curtis v. Title Guarantee & Trust Co., supra [3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323], and Greenberg v. Du Bain Realty Corp., supra, that a purchaser who has been induced to enter into a contract by the fraudulent misrepresentations of an agent, by rescinding the contract may recover the consideration paid from the principal, although the principal was in fact ignorant of the representations made, and although such principal had attempted to limit its liability by a clause in the contract to the effect that it would only be bound by the representations contained in the written contract. This is upon the theory that an innocent principal so contracting may not be permitted to enrich itself by reason of its agent's fraud, and that any property received by such principal is held by it as a constructive trustee for the person defrauded." (Emphasis added.) The court also held, contrary to the contention of the defendants, that there was no undue delay in rescinding the contract where it was shown that the delay was the result of indulgence shown the defendants by the plaintiffs.

In the case entitled Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736, 737, legal title to a tract of land then being sold was held by a trust company under a subdivision trust. The trustee executed all contracts of sale and collected the proceeds thereof. The contract of the plaintiff, who had purchased one of the lots, was subsequently assigned by the trustee to the appellant bank, to which the plaintiff continued to make payments toward the purchase price. Upon discovery of the falsity of certain representations made prior to and at the time of the sale, the plaintiff brought the action to rescind. The court held that the plaintiff was not precluded "from rescinding the contract for the false representations of the selling agent and recovering the money paid thereunder from the principal *or any trustee* to whom the same had been paid. * * *" (Emphasis added.)

[6] A consideration of all the facts and circumstances connected with the purchase of the lots by plaintiff herein, in the light of the declarations set forth in the aforementioned authorities, impels the conclusion, as a matter of law, that there was no evidence to support the findings upon which judgment for the defendant trust company was predicated.

[7] The contention that there was no evidentiary support for the finding to the effect that plaintiff had not adequately complied with the provisions of section 1691, Civil Code, in that he had not tendered a deed to the defendants, must be upheld. Each of the defendants admitted receiving a formal notice of rescission from plaintiff. Therein, plaintiff made a demand for the return of the money paid by him for the lots. The notice of rescission further recited that plaintiff "offered to return and tendered the return of everything of value" received by him under the contracts. Plaintiff testified that on or about the time he brought the action he executed a quitclaim deed in favor of the trust company, and mailed the same to his attorney in Los Angeles, with instructions that it be delivered to the trust company on receipt of the moneys demanded by him in his notice of rescission. That demand was not complied with. Furthermore, the record shows that the quitclaim deed was offered in evidence at the trial, although an objection to its admission was sustained by the trial court.

[8] With regard to the liability, if any, of defendant, *Cad M.* Newbery, the trial court found that she was the *widow* of *C. W.* Newbery and that she had succeeded to his estate, but that on November 29, 1926 (more than six years prior to his death) he had assigned all his beneficial interest in trust No. S—7334 to the defendant trust company; also, that the property which was the subject of the trust was her husband's separate property; that there was no contractual relation between said defendant and plaintiff, and that she had not assumed any obligation of *C. W.* Newbery in connection with the property which was the subject-matter of this action. These findings are supported by the evidence. Additionally, it may be noted that said defendant testified that she had received no moneys from the trust, and that her statement in that regard was not refuted. There appears to be no basis upon which liability against her may be made to rest.

[9] Finally, the trust company asserts that the judgment rendered against it should be made collectible out of the proceeds of trust S—7334 only; and with regard to that specific trust (S—7334), the trust company declares that the assets have all been paid out, assertedly for trustee fees, real estate salesmen's fees, street improvements and installation of sidewalks, and taxes. There is no showing that any of the proceeds from the sale of the lots were paid by the trust company to Newbery (or to his widow). Nor does the record show that *all* the lots in the tract were sold; if any of them *have not* been sold, the trust would have (potential) cash assets to the extent of the value of the remaining lots.

The cases entitled Curtis v. Title Guarantee, etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323; Graham v. Los Angeles First N. T. & S. Bk., 3 Cal.2d 37, 43 P.2d 543, and Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736, hereinabove referred to, were each factually similar to the case at bar, in that the purchaser of the lots, at a later time, brought an action for rescission because of alleged false representations, made at the time of purchase, relating to the sale of the property and proposed improvements thereto. In each of those cases, as in the instant case, at the time of purchase the legal title to the land was held in trust (for subdivision purposes), and recovery of the purchase price was sought *as against the trustee.*

In the case of Curtis v. Title Guarantee, etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323, the court found that the purchaser did not know he was dealing with the trust company in its trust capacity, but thought that the trust company was acting in its corporate capacity as owner of the fee, rather than as a trustee under a subdivision trust. The court ruled that the trust company,—having held itself out to be the owner in its corporate capacity—in order to avoid liability, could not rely on the fact that it was a trustee of an express trust. The court there relied on the holding in the case of Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, which case involved the liability of a principal for false representations of its agents, and said [3 Cal.App.2d 612, 40 P.2d 565]: "* * we are in accord with the above statements of the rule which will, all other things being favorable to the complaining party, allow him to rescind and *to pursue the principal* [the trustee] far enough to secure a return of the consideration paid." (Emphasis added.) There it is seen that the trustee was held liable in its corporate capacity where it had not made known to plaintiff the fact that it was acting as a trustee. However, what was said in that case does not necessarily imply that plaintiff could not have recovered against the trustee had she known that the trustee-seller in fact was acting as trustee under a subdivision trust.

In the case entitled Graham v. Los Angeles First N. T. & S. Bk., 3 Cal.2d 37, 43 P.2d 543, 546, the trust company contended that because the complaint contained no allegation that the trust company had the money of, or was indebted to, the beneficiaries, it failed to state a cause of action against the trustee bank to recover the money. But the court said, "Since the bank held legal title to the real property which the plaintiffs agreed to purchase, it follows that in the negotiations of purchase and sale relating to the real property, the bank stood in the position of *principal* and the beneficiary-sellers stood in the position of agents." (Emphasis added.) The court there further said that even though the complaint did not allege that the bank as trustee *held funds for or was indebted to the beneficiaries,* it did set forth the fact that the bank held legal title to the property *in trust* for the beneficiaries; that the purchase agreements were entered into with the bank as holder of the legal title, to whom the purchasers paid the various sums on the purchase price set out in said complaint; that they had demanded of the bank the return of said purchase price, and that said demand had not been complied with. The court held that these allegations were sufficient to render the bank liable, at least in its relation as trustee, for the repayment of the purchase price received by it. No substantial difference is readily discernible between the allegations set forth in the complaint filed in that case—which the court held were sufficient on which to predicate liability of the trustee—and the showing made by the plaintiff in the instant case. At least impliedly, the Graham case holds that the trustee-principal would be liable for the return of the money paid to it whether it held funds for or was indebted to the beneficiary-sellers, or not. The liability of the trustee in that case was predicated upon the fact that it was a principal in the transaction, rather than upon its status as a trustee. As such principal, it was held liable for the fraudulent representations of its agents—even though the latter were beneficiaries of the trust. The trustee being liable as a principal, on the theory of the principal and agency relationship, it could not assert its capacity as trustee to defeat the liability which would be fastened upon it as a principal under the agency theory.

In Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736, also, the court relied on the rule of Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, that an innocent *principal* so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded. After stating this rule, the court in Weiner v. Roof, supra, said [10 Cal.2d 453, 74 P.2d 737]: "The fact that respondent's written contract to purchase a lot contained a clause restricting the representations to those therein set forth, did not preclude the respondent under the foregoing rule, from rescinding the contract for the false representations of the selling agent and recovering the money paid thereunder from the *principal or any trustee* to whom the same had been paid. However, inasmuch as the rule in Speck v. Wylie, supra, is grounded upon unjust enrichment, and was announced subsequent to the trial of this cause, we are of the view that the appellant, as trustee of the money paid to it by respondent, should be afforded the opportunity of showing, as it asserts it can, that it has paid over to the beneficial owner the money for which judgment has been taken against it. Such a showing, if made, will disclose that the appellant [trustee], *an innocent party to the fraud,* has not been unjustly enriched and will preclude the entry of a monetary judgment against it under the rule mentioned." (Emphasis added.) In that case (Weiner v. Roof), as distinguished from the other two cases cited under the point now being considered, the appellant bank was said to be *an innocent party* to the fraud,—which was true because it was a *subsequent assignee* of the original trustee and, as such, it knew nothing of the fraudulent representations made at the time of the purchase; nor had it acquired any interest whatever in the contract until some time had elapsed after the said purchase. The situation there presented is, of course, distinguishable from the one in the case at bar. In the instant case the trustee appointed the agents who made the false representations at the time of plaintiff's purchase, and not only would it be liable for those fraudulent representations of its agents, under the rulings of Speck v. Wylie and the other cases hereinbefore mentioned, but the trustee was itself a party to the fraud practiced upon the plaintiff, in that: the receipt which it gave to plaintiff at the time of purchase carried the statement that its trust provided for the installation of the improvements; and that it made other false statements in the letters sent to plaintiff, to the effect that some of the improvements had been installed and others would be. These two facts, together with its failure thereafter to install the improvements, were evidence of its own fraud.

It follows from the foregoing discussion that the contention of the trust company that the judgment, if any, which may be rendered against it, should be collectible only from the assets of trust S—7334, is without merit.

In view of the conclusion reached herein, it becomes unnecessary to consider other points argued by respective counsel, including the contention that the property described in the deeds was not the identical property mentioned in the receipts received by plaintiff.

The judgment is reversed as to the defendant trust company, and affirmed as to the defendant Cad M. Newbery.

---

13 Cal.2d 591

## COOK v. LOS ANGELES RY. CORPORATION.

L. A. 17062.

Supreme Court of California.

May 31, 1939.

**1. Appeal and error 🔑277**

Upon appeal, a litigant may question correctness of a charge to jury without having objected when charge was given, since litigant is deemed to have excepted to each instruction. Code Civ.Proc. § 647.

**2. Trial 🔑314(1)**

A trial court can properly advise jury of importance of arriving at a verdict and of duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions.

**3. Trial 🔑314(1)**

A trial court is unauthorized to tell jury, at any stage of trial, that they must agree, and the statement of a trial judge to a disagreeing jury that they must arrive at a verdict, or language from which such peremptory order is logically inferred, is "coercion" and an invasion of province of jury.

[Ed. Note.—For other definitions of "Coerce; Coercion," see Words & Phrases.]

**4. Trial 🔑314(1)**

A trial court should not direct such remarks or admonitions to the jury as will tend unduly to hasten them in arriving at a verdict.

**5. Appeal and error 🔑1069(1)**
**Trial 🔑314(1)**

In passenger's action against street railroad for injuries, instructing, in response to request by jury for reading of instructions after deliberation, that all instruction court would give was that there was only one instruction and that was did the street car stop and start according to passenger's evidence, or did passenger fall by slipping, and that court would give jury 10 minutes more to deliberate, was prejudicial error as constituting "coercion."

**6. Trial 🔑312(1)**

Although statute authorizing trial court to give jury additional information after retirement for deliberation is not mandatory upon trial court such as to compel the trial court to give any information which jury may request, any reasonable request relating to rereading of instructions upon a topic which is doubtful in minds of jurors should not be willfully disregarded. Code Civ.Proc. § 614.

In Bank.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Evyonne S. Cook against the Los Angeles Railway Corporation to recover for injuries claimed to have been sustained while alighting from a street car. From a judgment entered upon a verdict in favor of the defendant and an order striking from the file certain affidavits presented by plaintiff in support of motion for new trial, plaintiff appeals.

Reversed.

For prior opinion, see 85 P.2d 143.

Harold D. Kraft, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

EDMONDS, Justice.

By this appeal the plaintiff challenges a judgment entered upon a verdict in favor of the defendant and an order striking from the file affidavits presented by her in support of a motion for a new trial.

The action was brought to recover damages for personal injuries assertedly suffered as the result of the negligent operation of a street car owned by the defendant. At the trial it was shown that the car on which she was riding had come to a stop at a street intersection, and that in trying to get off the car, the plaintiff fell to the street and was injured. The evidence upon the question whether the car had started forward before plaintiff had completed her descent from its rear platform was conflicting, but when it was submitted to a jury, a verdict in favor of the defendant was returned.

The chief ground upon which the plaintiff relies for a reversal of the judgment concerns the propriety of a special instruction given to the jury by the trial judge. After slightly less than two hours deliberation the jury returned to the court room and the following occurred:

"The Court: What is the trouble?

"The Foreman: We would like to have that part of your instructions read——

"The Court: There is only one instruction to be given you, and that is, now did this street car stop and start according to the plaintiff's evidence, or did she fall off by slipping or some other thing? That is all you have got to figure out. You should not be over fifteen minutes at most.

"The Foreman: There seems to be a difference of opinion.

"The Court: That is all I am giving now. I will give you ten minutes more to fix it up, because I am not going to keep you here longer on a simple question like that. I don't know what you would do with a complicated case if one as simple as this confuses you. You have got the evidence of people that said the car did not start. You have the evidence of the women or man who was on the street car, or the boy, who said it did start. It is up to you what followed. That is all there is to this case, ladies and gentlemen of the jury. It is as plain as the nose on your face. Go back and see what you can do.

"The Foreman: All right, your Honor."

Following this colloquy the jury retired and approximately ten minutes later returned to the court room with a verdict in favor of the defendant.

[1] The defendant urges that the plaintiff is precluded from complaining of the trial court's comments because the record shows that she stood by without objection or complaint at the time of their occurrence. But it is the law in this state that upon appeal a litigant may question the correctness of a charge to the jury without having made objection at the time the charge was given; he is deemed to have excepted to each instruction. Sec. 647, Code Civ.Proc.

[2-4] In criticising the instruction complained of, the plaintiff contends that it was misleading, suggestive and coercive. This point is well taken. A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. Allen v. U. S., 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528; Shaffman v. United States, 3 Cir., 289 F. 370. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks. "The court is unauthorized to tell the jury, at any stage of the trial, that they must agree. The statement of a trial judge to a disagreeing jury that they must arrive at a verdict, or language from which such peremptory order is logically inferred, is plain coercion and an invasion by the court of the province of the jury. The trial court should not direct such remarks or admonitions to the jury as will tend unduly to hasten them in arriving at a verdict." Reid's Branson: Instruction to Juries, 3d ed., vol. 1, p. 140.

[5] Tested by these rules the present instruction was plainly coercive. The plain implication of the trial judge's remarks is that he did not consider the plaintiff was entitled to recover, and that the jury should not take more than ten minutes to state that conclusion in a verdict. There can be no other reasonable construction of his statements, particularly in view of the fact that it would undoubtedly have taken the jury more than ten minutes to have considered and agreed upon the amount of damages to be allowed to the plaintiff if it had found a verdict in her favor.

[6] Moreover, it is evident that the foreman was about to request the rereading of an instruction when he was interrupted by the court. Section 614 of the Code of Civil Procedure provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel." While this provision is not mandatory upon the court to give any information which the jury may request, any reasonable request relating to the rereading of instructions upon a topic which is doubtful in the minds of the jurors should not be wilfully disregarded. In addition to refusing to reread the instructions on a topic that the jury might request, the judge, in saying "There is only one instruction to be given you", told them, in effect, to disregard all the instructions previously given by him.

It is probable, also, that as the plaintiff charges, the special instruction was suggestive and misleading. While the words used do not, on their face, appear to show any bias in favor of the defendant, other factors which are not disclosed by the record, such as the tone or inflection with which the comments were delivered, or the attitude of the court during the trial of the case, may well have imparted such an impression to the jurors. That this was their effect is indicated by the dispatch with which they arrived at their verdict, and that the court had a strong personal opinion concerning the merits of the case is shown by the following statement which he made to the jury immediately following their verdict: "Thank you, ladies and gentlemen of the jury. I do not see how you could have arrived at any other verdict. Had you given any other verdict, it would have been set aside."

Considering all of the circumstances shown, the trial judge's peremptory instruction unquestionably prejudiced the plaintiff's right to a fair trial and invaded the province of the jury.

The judgment is, therefore, reversed.

We concur: CURTIS, J.; SEAWELL, J.; HOUSER, J.; LANGDON, J.

---

33 Cal.App.2d 198

## NATIONAL SANITARY RAG CO. v. LAWRENCE et al.

Civ. 10839.

District Court of Appeal, First District, Division 1, California.

June 6, 1939.

**1. Jury ⟹139**

All of the defendants must join in the limited number of peremptory challenges allowed by statute. Code Civ.Proc. § 601.

**2. Appeal and error ⟹1045(1)**

Where plaintiffs did not use all of the six peremptory challenges allowed him and there was no evidence before appellate court upon which to consider the merits, any error in trial court's permitting each defendant to exercise six peremptory challenges and not requiring all to join in exercising six only, was without prejudice to plaintiff. Code Civ.Proc. § 601; Const. art. 6, § 4½.

**3. Jury ⟹79(3)**

Where each defendant was permitted to exercise separately the peremptory challenges allowed at law and during trial one of defendants withdrew from case, plaintiff had no vested right to the services of the jurors excused by that defendant but only to a fair and impartial jury. Code Civ.Proc. § 601; Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by National Sanitary Rag Company, a corporation, against Frank L. Lawrence and George R. Tuttle, individually and as copartners doing business under the firm name and style of Lawrence & Tuttle, and Geo. W. Reed & Co., a corporation, for a declaratory judgment with respect to certain United States customs duty refunds, wherein defendants Lawrence and Tuttle as copartners and defendant Geo. W. Reed & Co. each cross-complained. From an adverse judgment, plaintiff appeals.

Affirmed.

Clyde C. Sherwood, of San Francisco, for appellant.

Perry Evans and Francis W. Murphy, both of San Francisco, for respondents.

WARD, Justice.

This appeal pertains to the number of peremptory challenges that may be interposed against prospective jurors who have passed the qualification examination for cause. Code Civ.Proc. sec. 601.

The action originally was one for declaratory relief to determine the rights of the respective parties to certain United States customs duty refunds. The plaintiff named as defendants Lawrence and Tuttle individually and as copartners, and Geo. W. Reed & Co., a corporation. The defendants Lawrence and Tuttle individually and as copartners filed an answer, and as copartners cross-complained against the plaintiff corporation National Sanitary Rag Co. The corporation defendant Geo. W. Reed & Co. answered and filed a cross-complaint against plaintiff corporation. Several of the pleadings were subsequently amended.

Prior to the empanelment of the jury, cross-complainant Lawrence & Tuttle requested that each defendant and cross-complainant be permitted to exercise separately six peremptory challenges. The motion was granted. Defendant Geo. W. Reed & Co. used six challenges; Lawrence & Tuttle, five, and the plaintiff, five. During the trial of the action, the defendant Reed & Co. upon order of the trial court retired from further participation in the case upon the theory that any claim for a money judgment which it might have could be asserted against codefendants Lawrence and Tuttle only in case they should be successful in collecting certain fees from the plaintiff. It also appears that plaintiff had temporarily secured control of Geo. W. Reed & Co.; such control was subsequently released. The jury returned a verdict in favor of Lawrence & Tuttle.

[1-3] Appellant contends that the "other side" was permitted to use more peremptory challenges than allowed under the provisions of section 601, Code of Civil Procedure. In Switzler v. Atchison etc. R. Co., 104 Cal.App. 138, 151, 285 P. 918, 924, the court said: "We think the rule is well established in California and in other states having similar statutes or code provisions, that section 601 of the Code of Civil Procedure must be so construed as to require all of the defendants to join in the four peremptory challenges." In some states, where it appears that the parties on one side have conflicting rights; this rule has been modified. Rutland v. St. Louis etc. R. Co., Tex. Civ.App., 274 S.W. 284. Irrespective of the harshness of this rule in California, in the present case the plaintiff was prejudiced theoretically rather than practically. The transcript on appeal does not contain any of the evidence; hence we are unable to say that the ruling injured plaintiff in the decision upon the merits of the case. Plaintiff did not use all of the six challenges allowed, and secured a jury which was apparently satisfactory. If there was error, it was without prejudice to the rights of plaintiff. Sec. 4½, art. VI, Const.Calif. Plaintiff did not have a vested right to the services of certain jurors excused by Geo. W. Reed & Co., but only to a fair and impartial jury.

The judgment is affirmed.

I concur: KNIGHT, Acting P. J.

---

33 Cal.App.2d 299

**ISOM et al. v. CALIFORNIA JUNIOR REPUBLIC et al.**

**Civ. 12186.**

District Court of Appeal, Second District, Division 2, California.

June 8, 1939.

Rehearing Denied June 28, 1939.

Hearing Denied Aug. 7, 1939.

**Charities** ⚿45(2)

A corporation conducting a charitable institution for vocational training for boys and an athletic coach employed by such corporation were not liable for injuries received by a citizen of institution when pushed into empty cement swimming pool by another citizen elected as athletic leader by citizens of institution, where there was no evidence of negligence by the coach or by the corporation in selecting coach, notwithstanding that under rules of government of the institution the athletic leader exercised certain authority over other citizens, such fact not being sufficient to make him an "employee" of the corporation rendering it liable for his conduct.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Charles Isom, a minor, by Margaret A. Isom, guardian ad litem, and Margaret A. Isom, against the California Junior Republic (a corporation), A. W. Minard, and Roy Smylie, for expenses incurred and injuries claimed to have been received as the result of the minor plaintiff being pushed by Roy Smylie into an empty cement swimming pool at an institution operated by the corporation defendant. From judgments for plaintiffs, defendants appeal.

Judgments affirmed as to the last named defendant, but otherwise reversed.

George L. Greer, of Los Angeles, for appellants.

Fred G. Goldsworthy, Victor C. Folsom, and W. W. Wallace, all of Los Angeles, for respondents.

WOOD, Acting Presiding Justice.

The plaintiff, Charles Isom, a minor sixteen years of age suing by his guardian ad litem, recovered a judgment against defendant corporation, A. W. Minard, an employee of the corporation, and Roy Smylie for injuries which he suffered when he was pushed by Smylie into an empty cement swimming pool at the institution operated by the corporation defendant. His mother, Margaret A. Isom, also recovered a judgment for expenses incurred in caring for the minor's injuries. The appeal is prosecuted from these judgments.

The trial court found that defendants Smylie and Minard were agents, servants and employees of defendant California Junior Republic; that defendant Smylie "carelessly, recklessly and willfully" pushed Charles Isom into the empty swimming pool; that defendant corporation was conducting at the time of the incident a charitable institution but that plaintiffs did not have any notice or knowledge that the corporation was conducting a charitable institution; that defendant corporation "did not exercise due care in the selection of defendant Roy Smylie as one of its servants, agents or employees". Defendants contend that the evidence is insufficient to sustain the findings that Smylie was an agent or employee of the corporation.

For many years prior to the incident involved in this litigation defendant corporation had conducted as a public charity a farm for vocational training maintained in part by such funds as the parents of the inmates could provide and in part by various donations, bequests and payments received from community chests of various cities in the neighborhood of the farm. The institution, which cared for about one hundred twenty-five boys, received only those who were in need of twenty-four hour supervision. Different tasks were assigned to the boys such as farm work and machine shop work. The boys could play during recreational periods, defendant Minard being employed by defendant corporation as athletic coach. The expense of keeping each boy in the institution ranged from fifty to fifty-five dollars per month but it was not necessary for a boy to pay any sum whatever if he or his parents were not able to make payments. Those who were able to pay part of their expenses were required to do so. The mother of plaintiff Charles Isom paid the sum of twenty dollars per month and defendant Smylie paid the sum of ten dollars per month. The superintendent testified: "It is not a question of pay at all. It is a question of whether the boy needs twenty-four-hour supervision in order to make him a worth-while citizen, or whether he is to be loose on the street to be picked up and sent to the reform school."

The trustees of defendant corporation adopted the method of self-government for the institution in an effort to have the boys manage their affairs as much as possible. About six years before the incident in question the boys in the institution, whom we will call citizens for lack of a better designation, elected a committee of nine athletic leaders to direct the recreational activities. These leaders did not have authority to punish the other boys but did recommend punishment to the coach for his approval or disapproval. In case of a vacancy among the athletic leaders the remaining leaders filled the vacancy from among the citizens with the approval of the coach. Certain ones of the citizens were selected by the boys' council to act as policemen.

At the time that Charles Isom received his injuries defendant Smylie was one of the athletic leaders. Smylie directed Isom to cease playing basket ball and to play volley ball in the empty swimming pool. Upon Isom's refusal to go to the swimming pool he was seized by Smylie and pushed toward and into the pool, receiving the injuries as he fell.

There is no evidence that defendant Minard was guilty of negligence or that defendant corporation did not exercise due care in selecting him for the position of athletic coach. The judgments in favor of plaintiffs must rest upon their allegation that defendant Smylie was an agent and employee of the corporation. Unquestionably Smylie was not an employee of the other defendants. He was a citizen of the institution paying according to his means for his maintenance and was subject to the rules of the institution. In this regard he was in the same category as was Isom. The fact that under the rules of government of the institution he exercised certain authority over some of the other boys as an athletic leader did not make him such a representative of the corporation as to make the corporation liable for his conduct toward other citizens. In Hack v. Sacramento City Junior College Dist., 131 Cal. App. 444, 21 P.2d 477, 479, it is held that under the law making school districts liable for the negligent acts of employees of the district a student at a school could not recover against the school district for injuries occasioned by negligent acts of another student, even though directions were given to the student causing the injuries by one of the teachers. The court stated that "The fact that the students were attempting to carry out certain requests made by their instructor, Mr. Halstead, does not change the rule". The decision in this case was followed in McCloy v. Union High School Dist., 139 Cal.App. 237, 33 P.2d 882, wherein the court held that "in an action for damages for personal injuries to a student arising from the negligent acts of a fellow student, even though such fellow student act upon the order, direction, or instruction of an instructor of the school" the injured student could not recover damages against the school district.

One cannot read the record in this case without a feeling of deep sympathy for the plaintiffs. Mrs. Isom placed her minor son in the care of the officers of the institution fully expecting that his physical as well as his moral welfare would be safeguarded and improved. Owing to an unfortunate incident at the farm his arm was crippled for life. The members of this court cannot do otherwise than pass upon the legal question presented them, the question of the legality of the judgments under review. The question of the moral responsibility of the corporation must be left to the authorities in control of the institution. It is hard to believe that the humane individuals whose benevolences have made possible the operation of the farm would want to return the boy to his mother in a crippled condition without compensation for the serious injuries received through the fault of one of the other boys.

The judgments as to California Junior Republic a corporation and as to A. W. Minard are reversed. The judgments as to Roy Smylie are affirmed.

I concur: McCOMB, J.

---

33 Cal.App.2d 133

## PETERSON v. DONELLEY.

Civ. 6058.

District Court of Appeal, Third District, California.

May 29, 1939.

**1. Appeal and error 🔑931(1)**

Where appeal was brought up by way of bill of exceptions, court was required to assume that evidence was sufficient to support findings and judgment.

**2. Courts 🔑26**
**Trusts 🔑165, 298**

The superior court has original jurisdiction of an action for an accounting and removal of a trustee, and, having once acquired jurisdiction, will proceed to administer full relief and may order an accounting, remove a trustee, and even grant general relief, either equitable or legal.

**3. Parties 🔑12**

An action for accounting and removal of trustees of trust formed to develop lands for gas and oil could be brought by a holder of trust participation certificate sold to finance the development of the land, for and on behalf of all certificate holders, where allegations of complaint and the findings showed that there were approximately 3,000 certificate holders and it was impractical to bring them all before the court. Code Civ. Proc. § 382.

**4. Courts 🔑35**

A plaintiff need not affirmatively plead facts showing jurisdiction of superior court and lack of jurisdiction must be affirmatively shown, since superior court as a court of general jurisdiction is presumed to have jurisdiction over a particular cause.

**5. Appeal and error** ⟹150(1), 151(2)

In action for accounting and for removal of defendant as trustee of trust formed to develop lands for gas and oil, wherein complaint, answer, and findings of court merely established that defendant was sued in her capacity as trustee, defendant, as trustee, was not an "interested party" or a "party aggrieved" by the judgment removing her as trustee as respects right to appeal.

[Ed. Note.—For other definitions of "Aggrieved Party" and "Interest," see Words & Phrases.]

**6. Trusts** ⟹134

Trustee had no individual right to property belonging to corpus of trust and held only such title as was necessary to the discharge of her duties as trustee.

---

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Elmer E. Peterson against Jessie M. Donelley for an accounting and removal of defendant as trustee under trust formed for purpose of developing lands for oil and gas, which was consolidated for trial with two other suits. From an adverse judgment, the defendant appeals. Affirmed.

Ivan Miller, of Los Angeles, for appellant.

Ben Griffith and Malcolm Archbald, both of Los Angeles, for respondent.

PER CURIAM.

In this matter three suits have been consolidated for trial as they all grow out of the following facts:

In 1922 the John P. Mills Organization, a corporation, established three trusts, designated as K, L and N, consisting of acreage divided into units which were sold at $400 a unit. These trusts were formed for the purpose of developing the lands therein described for oil and gas, and unit certificates were sold to raise the funds necessary to pay for and develop these tracts.

Under the authority of the trusts the John P. Mills Organization, during 1922 and 1923 sold these units to various purchasers and issued certificates to such purchasers in accordance with the trust agreements.

Exploration for oil was made, and about 1925, having determined the land was nonproductive of oil, the trustee, in accordance with a provision in the trust agreement, proposed to sell the property and divide the proceeds thereof among the holders of certificates of interest in accordance with their respective rights.

When a title company was called upon to pass upon the title to the property it refused to pass title to the buyer for the reason that the declaration of trust contained no statement of the duration of the trust. Thereafter actions for declaratory relief were commenced by a unit holder in each of the trusts to have the trust declared void and empowering the trustee John P. Mills Organization to make sales of the land as provided in the trust agreement, and also to have it legally determined that the land was not productive of oil in commercial quantities.

In accordance with these proceedings a judgment was rendered in each case wherein the court found that the land did not contain oil or gas in commercial quantities, and that the property should be sold under the provisions of the trust agreement with the consent, however, of the unit holders, and that the proceeds be divided among the holders of the various units and that a resulting trust be declared. It being impossible to get the consent of all of the unit holders, no sale was made of any of the properties in the trust and no further attempts were made to develop oil or gas upon the lands.

In 1930 these three actions were commenced by Jessie M. Donelley, the appellant herein, and certain others, seeking to enjoin the John P. Mills Organization from selling the lands affected by the trust to terminate the same, and to appoint new trustees. An answer was filed and a judgment by stipulation of the parties was entered by which the John P. Mills Organization resigned as trustee and Jessie M. Donelley with two other unit holders were appointed trustees in trusts K, L, and N. It was also provided that the new trustees should pay to the retiring trustee $3,000 in each trust for money expended by the John P. Mills Organization for the benefit of the trust properties. These sums were later paid by contributions made by assessments by a small group of unit holders in each trust.

Thereafter Jessie M. Donelley and her cotrustees named in the decrees took over the collecting from the unit holders the assessments for the payment of the judgments, taxes, and the expenses of carrying on the duties of the trust. Few payments were made by the unit holders and additional calls were made from time to time.

In 1935 the three cases now before the court were filed, the plaintiff alleging that he brought the action for an accounting and the removal of the trustees upon behalf of the owners of the beneficial interests, for the reason that the questions therein involved were of common interest to all the unit holders and for the further reason that the owners of such beneficial interests were so numerous it was impractical to bring them all before the court. The court found this allegation to be true, and that there were approximately three thousand individual unit holders in the properties of the three trusts. The court also found there was a shortage in the account of appellant as trustee, together with other irregularities, and removed her as trustee. From this judgment Jessie M. Donelley has appealed.

It is somewhat difficult to understand exactly upon what points defendant seeks a reversal. The first point apparently is that the complaint does not state facts sufficient to give the court jurisdiction to order an accounting or for the removal of the trustees. Many of the specifications of insufficiency in the complaint cannot be here considered as no demurrer was filed to the complaint, and in others the allegations of the answers has supplied any defects that might be urged against the allegations of the complaint.

[1] This appeal also is brought to us by way of a bill of exceptions and we must assume that the evidence was sufficient to support the findings and judgment of the court.

[2] As to the jurisdiction of the superior court of an action for an accounting and the removal of a trustee, it is elementary that the court has original jurisdiction in all such cases. (Tulare Irrigation District v. Superior Court, 197 Cal. 649, 242 P. 725) and having once acquired jurisdiction will proceed to administer full relief and may order an accounting, remove a trustee, and even grant general relief, either equitable or legal. Dillon v. Cross, 5 Cal.App. 766, 91 P. 439.

[3] It is also claimed that the necessary parties were not before the court. This action was brought by one beneficiary for and upon behalf of all the beneficiaries, approximately three thousand in number. The allegations of the complaint and the findings were sufficient to show the parties were numerous, and that it was impractical to bring them all before the court. That was the situation in Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423, 424, where the court said: "That section [382, Code Civ. Proc.] provides that 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.' The interest of the numerous beneficiaries of the voting trust was collective and not separate. There is therefore presented an appropriate case for the application of the exception to the rule that all persons interested should be made parties."

[4] Furthermore, the superior court as a court of general jurisdiction is presumed to have jurisdiction over a particular cause. It is not necessary to plead affirmatively the facts showing jurisdiction, but lack of jurisdiction must be affirmatively shown. Cheney v. Trauzettel, 12 Cal.2d 158, 69 P.2d 832.

[5] Finally we fail to see wherein appellant, as trustee, is an interested party or a party aggrieved by the judgment herein.

[6] The complaint, the answer and the findings of the court merely establish that appellant was sued in her capacity as trustee of K, L, and N Trusts. As such trustee she has no individual right to the property belonging to the corpus of the trust but holds only such title as is necessary to the discharge of her duties as trustee. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14.

From a study of the record and briefs as presented, we find no error, and the judgment appealed from should be affirmed. It is so ordered.

33 Cal.App.2d 148

**In re DARGIE'S ESTATE.**

**Appeal of MARTIN.**

**Civ. 11085.**

District Court of Appeal, First District, Division 2, California.

June 1, 1939.

Rehearing Denied July 1, 1939.
Hearing Denied July 31, 1939.

**1. Executors and administrators ⇨319**

Proceedings for sale of property of estate of decedent are statutory, and the validity thereof depends on a substantial compliance with the law.

**2. Executors and administrators ⇨388(7)**

Title does not pass on confirmation of probate sale, but at a time subsequent thereto when executor makes the transfer and delivery of property pursuant to order of confirmation.

**3. Executors and administrators ⇨388(7)**

A provision in probate code that probate sale must be confirmed before title to property passes does not mean that title passes on confirmation, but merely that title cannot pass before confirmation. Probate Code, § 755.

**4. Executors and administrators ⇨337**

A notice of probate sale of personalty, requiring that purchase price should be paid when order confirming such sale should become final and personalty should be delivered to purchaser, called for "cash sale" and not "credit sale" within provision of probate code that 25% of purchase price be paid in cash at time of credit sale. Probate Code, § 773.

[Ed. Note.—For other definitions of "Cash Sale" and "Credit Sale," see Words & Phrases.]

**5. Executors and administrators ⇨337**

Provisions in probate code that proceeds of sale of property of estate must be applied to satisfaction of incumbrances against property did not invalidate notice of probate sale of personalty requiring that purchase price be paid on delivery of property to purchaser, notwithstanding that personalty had been pledged for a loan. Probate Code, §§ 762, 763.

**6. Executors and administrators ⇨368**

That check and not cash accompanied bid for purchase of personalty belonging to estate was in substantial compliance with notice of sale and provisions of probate code allegedly requiring that cash accompany bid, where check was promptly cashed and proceeds paid to executor before return of sale was filed. Probate Code, § 773.

**7. Executors and administrators ⇨319**

A substantial compliance with provisions of law regulating probate sales is sufficient.

**8. Executors and administrators ⇨368**

The failure of bidder to deliver, or failure of executor to demand, payment of actual cash as to deposit accompanying bid for purchase of personalty belonging to estate, does not invalidate probate sale, where executor receives and accepts and promptly cashes a good check as a deposit. Probate Code, § 773.

**9. Evidence ⇨21**

The District Court of Appeal judicially notices that checks and drafts are usual and ordinary means of transacting business and transferring money in all business transactions.

**10. Pleading ⇨15**

Generally, in absence of restrictions imposed by statute or by rules of court, facts alleged in other pleadings in the same case may be incorporated by reference in subsequent pleadings therein.

**11. Pleading ⇨15**

In California, incorporation of facts alleged in other pleadings by reference in subsequent pleadings is a recognized and accepted method of pleading.

**12. Executors and administrators ⇨374, 375**

An amended return of probate sale and petition for confirmation were not fatally defective for incorporating therein by reference certain allegations contained in original return.

**13. Executors and administrators ⇨375**

The superior court had jurisdiction to confirm probate sale, where notice of sale, bid and amended return of sale, and petition for confirmation were in substantial compliance with requirements of probate code. Probate Code, §§ 755, 762, 763, 773.

**14. Constitutional law ⇨314**
**Executors and administrators ⇨375**

The refusal to grant request of new counsel for continuance of hearing on amended return of probate sale and petition for confirmation of sale was not abuse of discretion or denial of due process of law, where request was orally made in open court when cause was called and superior court rules relating to applications for continuance were not complied with, and notice of change of counsel was not given or explained, and new counsel had general knowledge of matter, and many interested parties were in court and ready to proceed. Rules of Alameda County Superior Court, rule 19; Rules of Superior Court Adopted by Judicial Counsel, rule 12; Const. Cal. 1, art. 1, § 13; U.S.C.A. Const. Amend. 14.

**15. Executors and administrators 🔑1**

It is the policy of the law to expedite administration of estates and to avoid unnecessary delay and expense.

**16. Trial 🔑18**

The trial judge, in absence of some weighty reason to contrary, must vigorously insist upon cases being heard and determined with as great promptness as exigencies of the case will permit.

**17. Continuance 🔑17**

Parties have no absolute right to a continuance merely because of an unexplained change of counsel immediately preceding time set for hearing of cause, and refusal of continuance in such a case is not an abuse of discretion, in absence of some further showing.

**18. Executors and administrators 🔑375**

That counsel discussed proposed form of notice of probate sale in presence of trial judge was insufficient to show that the matter had been prejudged, so as to invalidate order confirming probate sale, where trial judge refused to express any opinion on form of notice to be used.

**19. Appeal and error 🔑1046(5)**

The trial judge's remarks and rulings, made in an effort to exclude irrelevant and valueless testimony and to expedite hearing on return of probate sale and petition for confirmation of sale, were not prejudicial as against appellant who greatly lengthened hearing by extensive and repetitious cross-examination.

**20. Evidence 🔑18**

It is common knowledge that 1929 values are not any certain index to values in 1938.

**21. Executors and administrators 🔑375**

Evidence *held* insufficient to show that confirmation of probate sale of estate property was an abuse of discretion on ground that the price was too low and that the confirmation constituted an approval of a breach of trust owed by the buyer to the estate.

---

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Herminia Peralta Dargie, deceased, wherein William T. Summers, executor, filed a petition for confirmation of sale of stock belonging to the estate, to William F. Knowland, J. Russell Knowland, Jr., and the Franklin Investment Company. The petition was opposed by Antonio Rodrigues Martin. From an order confirming the sale, Antonio Rodrigues Martin appealed. During the pendency of the appeal, William T. Summers, executor, died, and Peralta P. Wilson was substituted in his place and stead.

Order affirmed.

W. H. Metson and P. H. McCarthy, Jr., both of San Francisco, for appellant.

Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, for respondent Peralta P. Wilson, administrator, etc.

Robinson, Price & Macdonald, of Oakland, for respondents Knowland et al. and Franklin Inv. Co.

SPENCE, Justice.

This is an appeal from an order confirming a probate sale.

The sole appellant is Antonio Rodrigues Martin. Under the will of Herminia Peralta Dargie, deceased, said appellant was entitled to one-half of the residuum of the estate. Several years before the sale, appellant had assigned his entire interest in the estate as security. On May 8, 1938, his assignees reassigned to him a one per cent interest therein. During the pendency of this appeal, William T. Summers, the executor, died, and Peralta P. Wilson was substituted in his place and stead and now appears as one of the respondents herein. William F. Knowland, J. Russell Knowland, Jr., and Franklin Investment Company, the remaining respondents, were the purchasers at the probate sale.

Herminia Peralta Dargie died on December 8, 1929. Her estate had been in probate for approximately nine years at the time of the sale in question. The principal assets of the estate consisted of 899 shares of stock of the Tribune Building Company and 7500 shares of stock of the Tribune Publishing Company. These stock holdings were insufficient to give the estate control of either of said corporations. Said corporations were closed corporations; their stocks had never been listed upon any exchange; and there had not been any sales of said stocks for more than 20 years. Stocks in general, and newspaper stocks in particular, had constantly declined following the time of the death of said deceased in 1929. Both of the above mentioned corporations had ceased paying dividends.

The estate of the deceased was indebted for the expenses of administration, taxes and other items and there were numerous legatees named in the will. Some of said legatees had petitioned to compel a sale of sufficient assets to meet the expenses and cash bequests. Interest was running upon said legacies and the delay in consummating such a sale was involving a cost to the estate of approximately $1500 per month. The executor had unsuccessfully endeavored for approximately three years to negotiate a sale of some or all of these stocks which were the estate's principal assets. There had been many conferences and a great deal of correspondence concerning the situation between the executor and the other interested parties including the then counsel for appellant. The executor finally determined to call for competitive bids and consulted with the other interested parties regarding the form of notice of sale to be used. Counsel also discussed the proposed form of notice in the presence of the trial judge. The trial judge stated that the question was one for the executor to decide and refused to express any opinion on the course to be pursued.

The executor thereafter posted and published a notice of sale stating that he would sell, subject to confirmation by the court, on the 18th day of April, 1938, at 12 o'clock noon, for cash, to the highest bidder:

"(a) As a whole, all of the following described shares, namely, 899 shares of the capital stock of the Tribune Building Company, a California corporation; 7,500 shares of the capital stock of the Tribune Publishing Co., a California corporation; or

"(b) In combination, 899 of said shares of Tribune Building Company and 3750 of said shares of The Tribune Publishing Co.

"All bids or offers must be in writing, signed by the bidder and must be accompanied by a deposit of not less than 10% of the purchase price. * * * The unpaid balance of the purchase price shall be paid by the bidder in cash in full when the order confirming sale to such bidder shall become final and the shares, the sale of which is confirmed to him, shall have been delivered to him."

Only one bid was received, being the bid of respondents William F. Knowland, J. Russell Knowland, Jr., and Franklin Investment Company. Said bid was in the sum of $311,200 and was for 899 shares of stock of the Tribune Building Company and 3750 shares of stock of the Tribune Publishing Company. The bid was made in writing and was accompanied by a deposit in the sum of $31,120 consisting of a good check, made payable to the executor and drawn by the Farmers & Merchants Savings Bank of Oakland on the Wells Fargo Bank & Union Trust Co. of San Francisco. Said bid was accepted by the executor, subject to confirmation by the court. Said check was accepted by the executor as the required deposit and the money was credited to the executor's bank account.

The executor promptly filed a return of sale and petition for confirmation. A few days later, the executor, by leave of court, filed an amended return and petition for confirmation in which he specifically referred to all of the allegations of his original return and incorporated them by reference in the amended return. The first return had alleged the posting and publication of notice of sale but did not set forth in detail the facts showing how the notice had been posted and published. These detailed facts were alleged in the amended return.

Some three weeks later, and on May 9, 1938, the amended return came on regularly for hearing. Notice thereof had been given by posting and special notice thereof had been served by mail upon 66 persons interested in the estate, including appellant. Said appellant had been represented by counsel throughout the probate proceedings, but on the morning of the hearing, appellant appeared by new counsel who had been substituted just prior to the hearing. Appellant's new counsel orally requested a continuance but the request was denied. Appellant then filed written objections to the confirmation of the sale which consisted of a denial of the allegations of the return together with allegations that the sale was unnecessary; that it was not for the best interests of the estate; that the buyer had not come into court with clean hands; that the court should not approve conduct on the part of the buyer which constituted an alleged breach of trust to the estate; that the price bid was too low and was less than 90 per cent of the appraised value; and that no appraisement had been made within a year.

The hearing proceeded upon the amended return and petition and upon the objections thereto. It consumed ten days, commencing on May 9, 1938, and ending on May 27, 1938. The only opposition made to the confirmation of the sale was the opposition of appellant. Many interested parties appeared at the hearing and requested confirmation of the sale. At the conclusion of the hearing, a call was made in open court for other bids but no response was made. Arguments were heard and thereafter the court made its order confirming the sale.

The trial court found that all of the allegations of the amended return and petition were true and made other specific findings. It further found that the allegations contained in the written objections of appellant were untrue except that it found that it was true that the price was less than 90 per cent of the appraised value and that the property had not been appraised within the year. Among the facts thus found were the following: That the amount of unpaid expenses and cash bequests, together with interest, was approximately $350,000; that there was less than $20,000 in cash on hand and in money which would be shortly payable; that the above mentioned corporations were not paying dividends and it could not be determined when, if ever, the payment of dividends would be resumed; that it appeared that the probable sole income of the estate during 1938 would be dividends on other stock which dividends had amounted to $750 in 1937 and would probably continue; that the accruing interest items alone would exceed the probable gross annual revenue by approximately $15,000; that a sale was necessary for the purpose of paying debts, expenses of administration, taxes and cash bequests and that the above mentioned stocks were the only assets of the estate of sufficient value to produce the necessary funds. The trial court further found that notice of sale had been given as prescribed by law and proof thereof had been duly made; that the sale had been made to the purchasing respondents as set forth in the return for the sum of $311,200; that said sale was legally made and fairly conducted; that the bid was not disproportionate to the value of the property so sold; that no higher price had been offered; and that a higher bid could not be obtained. The allegations contained in appellant's written objections, which allegations are summarized above, were found to be untrue except as above noted.

It was therefore ordered that appellant's objections be overruled and denied; that the sale of said 899 shares of stock of Tribune Building Company and 3750 shares of stock of Tribune Publishing Co. to the purchasing respondents for the sum of $311,200 be confirmed; and that the executor be directed to transfer and deliver said stock to the purchasing respondents upon payment by said respondents of the purchase price.

Appellant makes no direct claim that the evidence was insufficient to support the findings of the court. An indirect claim to that effect may be inferred from other contentions made but a review of the record herein shows that all of the findings find ample support in the evidence. We will proceed to discuss appellant's contentions as presented in his brief.

[1] Appellant first contends that "The superior court had no jurisdiction to confirm the sale." This contention is based upon the claims that "there was no sale to be confirmed" and that the amended return and petition "were fatally defective". We find no merit in this contention. Appellant cites authority to the effect that the proceedings for the sale of property of the estate of a decedent are statutory and that the validity of such proceedings depends upon a substantial compliance with the law. Miller v. Superior Court, 84 Cal.App. 605, 258 P. 614. This general principle may be conceded but we cannot agree with appellant's argument that there was not a substantial compliance with the law in the proceedings leading up to the confirmation of the sale in question. He argues that both the notice of sale and the bid were defective but we believe there was a substantial compliance, if not a literal compliance, with every requirement relating thereto.

[2-5] As we understand appellant's argument, it is that as the notice of sale did not require that purchase price be paid im-

mediately upon confirmation but required that it be paid at the time that the order of confirmation became final and upon delivery of the property, said notice called for a sale upon credit rather than a cash sale and was fatally defective as it did not require a payment of 25 per cent of the purchase price in cash. Probate Code, sec. 773. This argument is in turn based upon the claim that title passes upon confirmation. It seems settled, however, that title does not pass upon confirmation, but at a time subsequent thereto when the executor makes the transfer and delivery of the property pursuant to the order of confirmation. Lass v. Eliassen, 94 Cal.App. 175, 270 P. 745; Barnes v. Morrison, 102 Cal.App. 152, 282 P. 986; see, also, In re Estate of Benvenuto, 183 Cal. 382, 383, 191 P. 678; 11B Cal.Juris., p. 164. The code sections, such as Probate Code, section 755, merely indicate that no title can pass prior to confirmation. We are therefore of the opinion that the notice of sale called for a cash sale and that the provisions of the code relating to credit sales were not applicable. Under the same heading, appellant states that the stock of the Tribune Building Company had been pledged for a loan of some $40,000 and he calls attention to sections 762 and 763 of the Probate Code. He claims that it would be impossible to comply therewith, as the purchasers were not required under the notice of sale to pay the balance of the purchase price until the shares were actually delivered. Assuming, without deciding, that said sections are applicable under the facts involved here and further assuming that it is possible that the indebtedness for which the stock had been pledged will not have been paid prior to the time of the consummation of the sale, said sections merely outline the procedure to be followed upon payment of the purchase price. There is nothing in said sections which could invalidate an otherwise valid notice of sale and we find no impossibility of full compliance with said sections upon the payment of the purchase price.

[6-9] The bid followed precisely the terms of the notice of sale. It was therefore not defective as claimed by appellant unless there be merit in his further claim that it was not accompanied by a deposit of ten per cent of the purchase price. This claim is based solely upon the fact that a good check for the sum of $31,120, rather than actual cash in that amount, accompanied the bid. Said check was promptly cashed and the proceeds were in the hands of the executor before the return was filed. We need not discuss the question of whether the law required a deposit on such a sale of personal property or the question of whether the notice here required the deposit to be made in cash. We may so assume but we are nevertheless of the opinion that the delivery and acceptance of a good check under the circumstances constituted a substantial compliance with all requirements of the law and of the notice of sale. Hooker v. Burr, 137 Cal. 663, 70 P. 778, 99 Am.St.Rep. 17; see, also, California Stearns Company v. Treadwell, 82 Cal.App. 553, 256 P. 242. A substantial compliance is sufficient upon a probate sale. In re Estate of Heydenfeldt, 127 Cal. 456, 59 P. 839; Richardson v. Butler, 82 Cal. 174, 23 P. 9, 16 Am.St.Rep. 101; Jerrue v. Superior Court, 7 Cal.App. 717, 95 P. 906; In re Estate of Reed, 3 Cal.App. 142, 85 P. 155; see, also, Stewart v. Justice's Court, 7 Cal.App.2d 61, 45 P.2d 424. It may well be that the executor could not be required to accept a check as a deposit (compare Mitchell v. Alpha Hardware etc. Co., 7 Cal.App.2d 52, 45 P.2d 442; Kelly v. Barnet, 24 Cal.App. 119, 140 P. 605), but where an executor does receive and accept a good check as a deposit and promptly cashes the same, it would be hypertechnical to hold that the sale is invalidated by the failure of the bidder to deliver or the failure of the executor to demand the payment of actual cash. As was said in Hooker v. Burr, supra, 137 Cal. at page 668, 70 P. at page 780, 99 Am.St.Rep. 17, "* * * a check, after all, is but a convenient form of transferring money. * * *" And again in California Stearns Co. v. Treadwell, supra, 82 Cal.App. at page 559, 256 P. at page 245, "'It would seem, however, that this court should take judicial notice of the fact that checks and drafts are usual and ordinary means of transacting business and transferring money in all business transactions.'"

[10-12] The claim that the amended return and petition were fatally defective is based upon the fact that certain allegations contained in the original return were incorporated by reference into the amended return and were not again set forth in full in the amended return. It is conceded that the allegations so incorporated by reference were full and complete but it is argued that there is no statutory authority

for such incorporation by reference. Said point was not raised in appellant's written objections filed in the court below but, in any event, we find no merit therein. The general rule is that in the absence of restrictions imposed by statute or by rules of court, facts alleged in other pleadings in the same case may be incorporated by reference in subsequent pleadings therein. 49 Corp.Juris. 550, sec. 752; 49 Corp.Juris. 37, sec. 13. We find no such restrictions in the statutes or rules of court in this state and such incorporation by reference has become a recognized and accepted method of pleading. Reid v. Merrill, 4 Cal.2d 693, 52 P.2d 218; Treweek v. Howard, 105 Cal. 434, 39 P. 20; Clark v. Berlin Realty Co., 33 Cal.App. 50, 164 P. 333.

[13] We conclude that none of the above mentioned claims of appellant sustain his contention that the court had no jurisdiction to confirm the sale. On the contrary, it appears that there was a proper notice, bid and amended return and petition, all of which substantially complied with all requirements. The court therefore had jurisdiction.

Appellant makes the further contention that "the Superior Court violated the Fourteenth Amendment of the United States Constitution U.S.C.A., and section 13 of article I of the Constitution of the State of California". From the argument it appears that appellant claims that he was denied due process of law as (1) the court refused to grant a continuance of the hearing and (2) as "the record discloses that the entire matter had been prejudged and the court made no secret of its bias and prejudice to the extent that due process was impossible".

[14] We find neither an abuse of discretion nor any denial of due process on the part of the trial court in refusing to grant the request for a continuance. Said request was orally made in open court when the cause was called and there was no attempt to comply with the requirements of rule 12 of the Rules of the Superior Court adopted by the Judicial Council or with the requirements of rule XIX of the Rules of the Alameda County Superior Court relating to applications for continuances. But aside from this, appellant changed counsel shortly before the hearing, gave no notice thereof prior to the hearing, and made no explanation thereof. His new counsel admitted that they had a general knowledge of the matter before the court but they nevertheless asked for a continuance of two weeks. The trial court was familiar with the conditions of the estate and the added expense which would be involved by delay. Many interested parties were in court and ready to proceed.

[15-17] It is the policy of the law to expedite the administration of estates and to avoid unnecessary delay and expense (In re Estate of Smith, 16 Cal.App.2d 239, 60 P.2d 574; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102), and it "is a part of the bounden duty of the trial judge, in the absence of some weighty reason to the contrary, to vigorously insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit". Flynn v. Fink, 60 Cal.App. 670, 673, 213 P. 716, 717. Parties have no absolute right to a continuance merely because of an unexplained change of counsel immediately preceding the time set for the hearing of the cause and, in the absence of some further showing, it is not an abuse of discretion to refuse a continuance under such circumstances. Flynn v. Fink, supra; Berger v. Mantle, 18 Cal.App.2d 245, 63 P.2d 335. There was no such further showing made in the present case.

[18, 19] The second claim of appellant under the above mentioned heading is not borne out by the record. The argument is that the trial judge conferred with the attorneys and passed upon the form of the notice of sale before said notice was posted and published. The evidence is to the contrary and shows that the trial judge had refused to express any opinion on the form of notice to be used. There is not a particle of evidence to show that any part of "the entire matter had been prejudged". Neither is the claim of bias or prejudice on the part of the trial judge supported by the record. Appellant has set forth a few remarks and rulings of the trial judge during the lengthy hearing and apparently claims that these remarks and rulings should be held by this court to show such bias and prejudice as to amount to a denial of due process. This claim may not be sustained. A review of the voluminous record, consisting of three volumes, shows that appellant was accorded a full and fair hearing. The hearing was greatly lengthened by the extensive

and repetitious cross-examination conducted by counsel for appellant and the rulings and remarks of the trial judge were obviously made in an effort to expedite the hearing and to exclude irrelevant testimony and testimony which was so remote in point of time as to be valueless. We find neither prejudicial error nor any denial of due process in said remarks and rulings.

In his argument on the subject of the alleged denial of due process, appellant cites and relies upon McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691. He insists that it "is in point and determinative of the matters in support of which it is cited". In our opinion, however, a review of the voluminous record in the present case shows that the rules laid down in the McClatchy case can have no application here.

The final contention of appellant is that "The confirmation of this so-called sale was an abuse of discretion." His claims under this heading appear to be (1) that the price was too low, (2) that the confirmation constituted an approval of a breach of trust owed by the buyer to the estate and (3) that the proposed sale was not necessary. These claims apparently constitute an indirect attack upon the sufficiency of the evidence to sustain the trial court's findings to the contrary but there was ample evidence to sustain all of said findings.

The provisions of section 784 of the Probate Code, requiring that the sum offered be at least 90 per cent of the appraised value, relate by their terms only to sales of real property. There are no similar provisions relating to sales of personal property.

[20, 21] Appellant states that the stocks were sold here for approximately 60 per cent of their appraised value. Assuming this to be true, it must be recalled that the appraisement purported to show their value in December, 1929, while the sale was made in April, 1938. It is a matter of common knowledge that 1929 values are not any certain index to values in 1938. But it is not necessary to rest on matters of common knowledge for there was ample evidence to show that the bid price represented the fair value of the stocks in question in April, 1938, and it is not claimed that there was any other person then or at any time since who was then or has since been willing to offer a higher price. It may be added that the testimony showed that the average value of good industrial listed stocks in April, 1938, was about 49 per cent of their average value in December, 1929.

Appellant argues that there was an alleged breach of trust owed by the buyers to the estate. The findings of the trial court against appellant on this issue find ample support. It may be true that the Tribune Building Company and the Tribune Publishing Co. "are controlled by the Knowland interests" but there appears to be nothing in the record to show anything in the handling of the affairs of said corporations which constituted a breach of trust. The argument with respect to the non-necessity of the sale is closely linked to the foregoing argument for it is argued "such apparent necessity as may seem to exist is the creature of the Knowland interests". Appellant points to testimony regarding the dividend policy and the salary policy adopted by the two corporations above mentioned. There appears to be nothing about said policies which would stamp them as anything other than good business practices on the part of said corporations or as anything out of line with the policies adopted by other corporations under similar circumstances during the past several years. We therefore conclude that there was no abuse of discretion upon the part of the court in confirming said sale.

The order confirming the sale is affirmed. Respondents will recover their costs on appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 164

## HILL v. SECURITY FIRST NAT. BANK OF LOS ANGELES.

Civ. 2303.

District Court of Appeal, Fourth District, California.

June 1, 1939.

**1. Account stated** ⇨1

In order to constitute an "account stated," it must appear that at the time of the accounting a claim existed, that a balance was then struck and agreed upon, and that the defendant admitted that a definite sum was due as a debt from him to the claimant.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

**2. Account stated** ⇨4

Evidence indicating that uncle was induced to make will leaving his property to nephews and nieces by third person who located nephews and nieces for the purpose, and that uncle gave third person a letter to nephews and nieces, stating that uncle had "agreed with him for you to pay him" specified percentage of their shares in the estate, and that "I hereby accept this as my obligation * * * which I direct to be paid from you," did not establish an "account stated" between uncle and third person.

**3. Limitation of actions** ⇨148(4)

A letter from uncle to nephews and nieces, directing them to pay third person a specified percentage of their shares of uncle's estate, to compensate third person for his services in locating nephews and nieces and inducing uncle to leave them his property by will, but not referring to an existing debt from uncle to third person, did not toll statute of limitations on third person's claim against uncle for services, especially where third person admitted that he did not act at uncle's request. Code Civ.Proc. § 360.

---

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by W. L. Hill against the Security First National Bank of Los Angeles, as executor of the last will and testament of James M. Dance, deceased, for services rendered to deceased, and on account stated. From a judgment for defendant, plaintiff appeals.

Affirmed.

George J. Stepovich, of San Jose, Maurice C. Atchison, of Beverly Hills, and Harry W. Horton, of El Centro, for appellant.

Childers & Roberts, of El Centro, for respondent.

BARNARD, Presiding Justice.

James M. Dance died testate on January 4, 1937, leaving his property to six nephews and nieces, share and share alike. Five of these beneficiaries lived in Missouri. Plaintiffs presented a claim to the executor of this estate which was rejected and this action followed.

The complaint sets forth two causes of action. The first is on quantum meruit for services rendered to the deceased at his special instance and request, the reasonable value of which is alleged to be $1,875 plus 15 per cent of 5/6 of the estate left by him. The second count alleges that an account was stated between the plaintiff and deceased whereby a balance was found and it was agreed that there was due from the deceased to the plaintiff the sum of $1,875 plus 15 per cent of 5/6 of the estate left by him. The court made findings and entered a judgment in favor of the defendant and the plaintiff has appealed.

The appellant's entire claim is based upon services which he claims to have performed at the request of the deceased in locating the nephews and nieces of the deceased, their addresses and even their existence being theretofore unknown to the deceased. It clearly appears that such services, if any, were rendered more than two years before the death of Mr. Dance, and no attempt was made to prove that any of such services were rendered within that time. The appellant introduced some evidence to the effect that he had spent some time and effort in locating these relatives and mainly relies, in so far as the evidence is concerned, on a letter or writing which he testified was handed to him by the deceased. This is addressed to four of the five relatives who lived in Missouri and reads as follows:

"Guy M. Ancell, Johlal E. Ancell, May Ancell Slater and Daisy Ancell Kerr, Slater, Mo.

"Dear Nephews and Nieces:—

"This is to certify that I, James M. Dance has known and dealt with Mr. W. L. Hill, for over 19 years and that Mr. Hill is directly responsible for locating each of you and causing me to meet and know you. For several years Mr. Hill has insisted on me allowing him to locate you for the purpose of you sharing in my Estate. After locating you he insisted on my making a trip to Slater, Mo., in order to satisfy myself that all of you are the children of my sister Georgia. This is the first time I ever went back there. I left home when I was eleven years of age on account of being mistreated by my father and I resolved never to turn back to my kin-folks. When I left home which was 76 years ago, I was so young that I hardly knew my mother and never knew anything about her folks or you children until Mr. Hill brought us together. I must say that you are deeply indebted to him. I have up to this date only seen most of you once and two of you twice in all my life. I want each of you to know that when I gave you the Twelve Thousand Five Hundred ($12,500.00) Dollars in cash and U. S. Government Bonds in 1934 was intended to be your full share and part of my Estate and the balance was to go to Tommy Pettett and Mrs. Lansing and her children.

"I have never paid Mr. Hill for his services on many occasions &c., and have agreed with him for you to pay him fifteen (15) per-cent of any and all moneys you have and will receive through my Estate, including the above mentioned $12,500.00, and to be paid to him from and out of your ⅝ interest in my Estate after my death. I hereby accept this as my obligation to W. L. Hill which I direct to be paid from your without litigation or Court procedure on your part as outlined in my last Will and Testament.

"This 11th, day of March 1936.

"James M. Dance."

The appellant contends that the court erred in finding that there was no account stated. It is argued that the evidence that he had spent time and effort in locating these relatives, together with this writing, established and proved an account stated, and the finding to the contrary is not supported by the evidence.

[1] In order to constitute an account stated it must appear that at the time of the accounting a claim or claims existed, that a balance was then struck and agreed upon and that the defendant admitted that a certain and definite sum was due as a debt from him to the claimant. Walsh v. Parker, 24 Cal.App.2d 224, 74 P.2d 531. In Petrosino v. Wakefield, 138 Cal.App. 336, 31 P.2d 1056, 1057, the court said: "An account stated is something different from a mere acknowledgment that a party knows himself to be indebted to another in some amount." In Bennett v. Potter, 180 Cal. 736, 183 P. 156, 160, it is said: "The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same."

[2] Examining the evidence, particularly this writing, in the light of these well-established rules, it must be held that there was a failure to prove an account stated. The writing which is mainly relied upon as proving an account stated falls short of establishing the necessary facts. The only agreement therein is that an indefinite amount, which could not then be determined and which was necessarily dependent upon many future things, was to be paid by others who were not parties to the agreement. According to the terms of the writing, the appellant had agreed to this arrangement. While the writer of the letter referred to "my obligation to W. L. Hill", he merely accepted the obligation, whatever it was, as one which he agreed that his legatees and devisees ought to pay and he accepted it only by directing them to pay the same. In effect, the writing is merely a statement that the parties to whom it is addressed are under an obligation to this appellant, that they ought to pay him, and that he desires them to do so. At best, it is only a direction as to what he wants them to do with a portion of what he has given them in his will. There is no attempt to fix a certain or definite amount of indebtedness and there is no agreement or promise, express or implied, that even the indefinite amount referred to will be paid by the deceased. If there is anything clear from the language used in the writing it is that the writer thereof did not intend to pay anything to the appellant.

[3] The appellant further contends that even if there was not an account stated, the writing in question is sufficient, under the provisions of section 360 of the Code of

Civil Procedure, to toll the statute of limitations and therefore he should have recovered upon the first cause of action for the reasonable value of services rendered by him "at the special instance and request" of the deceased, the reasonable value thereof being fixed by the writing. We think this contention is without merit since the writing in question contains no reference to an existing debt owing to the creditor which the debtor was willing to pay. Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009. However, this is not important if there is support for the court's finding that the services of the appellant in locating these heirs were not performed at the request of the deceased but "were performed on the volition and at the insistence of the appellant and no one else". Not only is this finding supported by the above-quoted writing upon which the appellant's claim is largely based, but it is also supported by a letter written by the appellant to one of the nephews in Missouri under date of February 1, 1937, shortly after the death of the decedent. In this letter, among other things, he says:

> "I am the one who had him to change his will. * * * I insisted from time to time on your Uncle Jim to allow me to locate you people, which was first strongly against his wishes, but finally got his consent. All of you would be very much surprised to actually know all what expired between he and myself regarding my locating you folks, whom he had never seen nor heard from or of * * * I have papers signed by him showing all of the above, and assuring me that I would be liberally taken care of by each and all of you, signed by James M. Dance. This is the reason I have never bothered you before, as he did not want me to do so as he said he might change his will * * * Be Sure To Remember, that Mr. Dance did not ask me to locate you folks, But I Insisted On Him Allowing Me To Do So, evidence of which I have from Mr. Dance himself. Therefore Mr. Dance expected each and all of you to properly take care of me in view of what I have done for each and all of you. This is as much a moral obligation as well as a legal obligation."

The finding in question is amply supported by the evidence.

In view of what has been said, it is unnecessary to consider the further questions as to whether the appellant's claim is based upon a written instrument within the meaning of section 706 of the Probate Code and if so, whether his claim was properly filed or presented since a copy of the writing was not attached thereto.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

---

33 Cal.App.2d 89

## COURTS v. THOMSON et al.

Civ. 10792.

District Court of Appeal, First District,
Division 1, California.

May 26, 1939.

**Appeal and error** 🔑**1160**

Where all the parties joined in a stipulation requesting reversal of that portion of the judgment appealed from and it appearing from an examination of the record on appeal, including the transcript of the evidence, that legal grounds existed for the granting of such request, judgment was reversed and remanded.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Frank Courts, Jr., a minor, by and through his guardian ad litem Frank Courts, Sr., against Arthur D. Thomson, Sarah F. Thomson and Chas. A. Smart. Chas. A. Smart cross-complained against plaintiff. From part of judgment awarding to plaintiff damages against Chas. A. Smart and denial of relief on his cross-complaint, Chas. A. Smart appeals.

Judgment reversed and appeal from denial of relief on cross-complaint dismissed.

Ross D. Pelton and J. Hampton Hoge, both of San Francisco, for appellant.

Francis N. Foley, of San Mateo, for respondent Courts, Jr.

A. Dal Thomson, of San Francisco, for defendants Thomson.

PER CURIAM.

All of the parties to the above-entitled action have joined in a stipulation requesting a reversal of that portion of the judgment appealed from herein, awarding damages against the appellant Chas. A. Smart, and the reentry of judgment in his favor on the cause of action sued upon in the complaint; and it appears from an examination of the record on appeal, including the transcript of the evidence, that legal grounds exist for the granting of such request. It is ordered, therefore, that said portion of the judgment appealed from be and the same is hereby reversed with directions to reenter the same in appellant's favor on the cause of action set forth in the complaint; and it is further ordered that in accordance with the terms of such stipulation the companion appeal taken by the said Chas. A. Smart from that portion of said judgment denying him relief on the cause of action sued upon in his cross-complaint be dismissed, and that the remittitur herein issue forthwith, without costs to either of the parties to said appeal.

33 Cal.App.2d 93

## MARGELLINI v. PACIFIC AUTOMOBILE INS. CO.

Civ. 2059.

District Court of Appeal, Fourth District, California.

May 27, 1939.

Rehearing Denied June 19, 1939.

Hearing Denied July 24, 1939.

**1. Insurance 🔑388(5)**

The failure of representative of automobile liability insurer to demand statement from insured's wife who was driving automobile at time of accident, when she appeared in court in connection with charge of reckless driving, was not a waiver of co-operation clause of policy, where claim had not then been made on insurer and it was not to be anticipated that wife would thereafter conceal herself and fail to make report.

**2. Insurance 🔑311(1), 514½**

The failure of insured and wife driving automobile at time of accident, to report accident to insurer and to co-operate with insurer by making fair and frank disclosure of their information as to accident when requested to do so by insurer, was in violation of co-operation clause of automobile liability policy and barred recovery against insurer by injured person who had unsatisfied judgment against insured and wife, where insurer was prejudiced by such failure. St.1919, p. 776.

**3. Insurance 🔑514½**

Under co-operation clause of automobile liability policy, insured and his wife driving automobile at time of accident were required to report accident and to co-operate with insurer by making a fair and frank disclosure of such information as they possessed concerning facts in connection with accident.

**4. Insurance 🔑514½**

The alleged intoxication of motorist at time of accident did not of itself conclusively show that motorist had no defense to action by person who was injured in accident, and that therefore motorist's failure to make fair and frank disclosure of all information as to accident as required by co-operation clause of automobile liability policy was not prejudicial to insurer so as to permit injured person to sue insurer on unsatisfied judgment against motorist despite such failure. St.1935, p. 93.

**5. Insurance 🔑514½**

Prejudice to automobile liability insurer would be presumed from failure of insured and wife who was driving automobile at time of accident to make fair and frank disclosure of their information as to accident as required by co-operation clause of policy.

---

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Josephine Margellini against the Pacific Automobile Insurance Company, upon a public liability and property damage policy. From a judgment for the plaintiff, the defendant appeals.

Reversed, with directions to enter judgment in favor of defendant.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

Stanford & Yale and R. E. Jenson, all of San Diego, for appellant.

Stickney & Stickney, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action against an insurer upon a public liability and property damage policy containing the provision that "in case final judgment is secured against the assured, the claimant may maintain an action against the company on this policy, subject, however, to its terms and limitations, to recover on said judgment". (See Stats. 1919, p. 776.)

The policy, issued to one Frank Levar, provided that its terms should inure to the benefit of any person operating the automobile described therein with the permission of the assured. It also contained a paragraph headed "Accident and Suit Notice and Co-operation", providing that the assured should give immediate written notice of any accident "with the fullest information obtainable, including names and addresses of witnesses" ; that he should give like notice of any claim made; that in case suit was brought he should immediately forward any summons or process served upon him; and that, when requested, he should "aid in effecting a settlement, in obtaining evidence, in procuring the attendance of witnesses * * * and shall fully cooperate with the company at all times, except in a pecuniary way, in the defense of any suit brought". It was further provided that each of these duties "is a condition subsequent".

The plaintiff was injured in a collision between an automobile owned and driven by her and the automobile described in the policy, which was then being driven by Patricia Levar, the wife of Frank Levar. In an action against the Levars, in which they defaulted, the plaintiff secured a judgment for $3,190. She then brought this action, in which a jury returned a verdict in her favor for a like amount, and the defendant has appealed from the judgment which followed.

The appellant contends that the undisputed evidence discloses such a breach of the terms of the policy on the part of the assured as will prevent a recovery by the respondent, and that the court erred in instructing the jury that any failure on the part of the assureds to comply with the "conditions" of the policy concerning notice, forwarding of summons, and cooperation, was not a defense unless the appellant was "damaged thereby".

The facts are practically undisputed and are as follows: The accident happened on July 13, 1935. Shortly after the collision a police officer took Mrs. Levar into custody as being intoxicated, although the charge actually lodged against her was one of reckless driving. The same day an attorney Breeden interviewed her at the jail and two days later he inquired of the American National Underwriters, whose stamp appeared upon the policy, whether the policy made any provision for bail in case of an arrest, telling them where the accident had occurred but giving them no other facts concerning the same. This firm was not authorized to write policies but has been authorized by appellant's local agent to take and forward to him reports of accidents.

On July 16, 1935, Breeden appeared in police court with Mrs. Levar and the case was continued to July 24, Mrs. Levar being released on her own recognizance. Mrs. Levar did not appear for trial on July 24 nor on August 1, to which date the case was continued, and Breeden testified at the trial of the instant case that he had not seen her since July 17, 1935. He further testified that on July 16, while he and Mrs. Levar were in court, an insurance man, whom he believed was a certain Moran who was employed by the Le Barron Company, which company acted as an adjuster for the appellant, came to him and asked about the accident although he did not believe that he talked with Mrs. Levar. His identification of Moran was not positive. Moran testified that he never heard of the matter until July 23, 1935, and that he was not in court until July 24th. On that date he told Breeden that he had located a witness who would testify that Mrs. Levar was not at fault in the accident but that the fault was that of Mrs. Margellini, the present respondent, and that there would be other witnesses who would testify to the same effect.

Meanwhile, on July 20, 1935, Edgar G. Langford, then acting as attorney for Mrs. Margellini, wrote to the American National Underwriters to the effect that he was instructed to file suit for damages, but would be glad to discuss a settlement. This letter reached the hands of the appellant's resident agent within a day or two, and was turned over to the Le Barron Company for attention and referred by it to Moran. The Le Barron Company started an investigation, interviewing residents in the neighborhood where the accident occurred, causing the respondent to be examined by a physician and looking into the damage done to her automobile. On July 25, 1935, the Le Barron Company wrote to the appellant stating that its local agent had dispatched repeated communications to the address given by Mrs. Levar with the request that she submit the necessary report as required by the policy, but that she had not responded to such requests; that an investigator had called at the address given by Mrs. Levar and was informed that she had undoubtedly left the city in view of the fact that at the time of the accident she was already under a six months' suspended commitment by the local police court; and that when the case in the police court was continued to August 1, they had gone to Mrs. Levar's home and informed her friends of this continuance and again urged them to use every effort to contact Mrs. Levar and direct her to get in touch with their office. On August 1, 1935, the Le Barron Company again wrote the appellant reporting that Mrs. Levar had failed to appear in the police court; that the court had ordered a bench warrant issued for her; and that they had informed respondent's attorney, Mr. Langford, that they had made every possible effort to contact Mrs. Levar without success, and requested him to immediately communicate with them in the event he secured any information as to her whereabouts. On August 9, 1935, the Le Barron Company wrote another letter to the appellant reviewing its unsuccessful efforts to locate or get a statement from Mrs. Levar, stating that Mr. Langford, respondent's attorney, had offered to settle her claims for $2,000, and saying any further information from the attorney or from the assured would be at once reported.

On August 1, 1935, the Le Barron Company sent registered letters to Mr. and Mrs. Levar requesting a report of the accident in accordance with the terms of the policy, and stating that a claim had been made upon them by the injured party, that without a report from Mrs. Levar they could not proceed with the matter, and that in the absence of cooperation from the assured the company would not defend any action nor pay any claim arising from the accident. The letter addressed to Mrs. Levar was returned as undeliverable. Mr. Levar answered from San Francisco under date of August 9, 1935, saying that he knew nothing other than the fact that there had been a collision, that he would be in San Diego about August 24, and that he would know more about it at that time. Mr. Levar appeared at the Le Barron Company's office on August 22, and stated that he had been away when the accident occurred and knew nothing about it. He was told that they would proceed with the investigation and do what was necessary to protect his interest if he would get Mrs. Levar to tell them what had occurred. He replied that he would try to do this but no report was ever received from Mrs. Levar and he never returned. Nothing further was heard from the Levars until September 20, 1936, when they forwarded to the appellant summons and complaint in the action brought against them by the respondent, which had been served upon them on June 17, 1936. Sometime in July, 1936, Mr. Langford had informed the Le Barron Company that such service had been made. The papers were returned to the Levars by the appellant with a refusal to assume any obligation under the policy.

[1] The only conflict is with respect to whether a representative of the Le Barron Company saw Mrs. Levar in court on July 16, 1935. The respondent argues that such a representative saw her then and could have obtained a statement from her if one was desired. Mr. Breeden was not positive as to the identity of the man who talked to him at that time but if we assume that this was Moran no claim had then been made, and the duty of reporting the accident and furnishing information concerning the same then rested upon Mrs. Levar and her husband. Moreover, even if any opportunity to obtain a statement from her was presented during this court appearance, it was not to be anticipated that she would thereafter not only fail to make a report but actually conceal herself. We think this conflict in the evidence is immaterial and that the appellant did not waive the provisions of the policy in question by failing to demand a statement from Mrs. Levar on July 16 if, in fact, any such opportunity existed.

[2] Not only was there a failure here to make the reports required under the terms of the policy, but there was a violation on the part of the assured of the cooperation clause contained therein which we think brings this case within the principles of the recent case of Valladao v. Fireman's Fund Indemnity Company, Cal. Sup., 89 P.2d 643, 646, and which bars a recovery on the part of the respondent. In that case it was pointed out that it is now definitely settled in this state that in an action of this character the injured person stands in no better position than the assured with respect to the effect of a violation, on the part of the latter, of a cooperation clause in the policy; that a condition of a policy requiring the co-

operation and assistance of the assured in opposing a claim made, or an action brought, by an injured party is material to the risk and of the utmost practical importance; that without such cooperation and assistance the insurer is severely handicapped and may be precluded from making any defense; and that the insurer is entitled to know from its assured the true facts concerning the accident, in order that it may determine for itself whether to contest or attempt to settle the claim.

In that case, the court said: "Our examination of many authorities indicates the general rule to be that under a cooperation clause the assured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense." After stating that the question of whether or not an assured has cooperated within the meaning of the policy is ordinarily one of fact, the court held that the issue became one of law where, as in that case, the evidence on the subject is not materially in dispute and it appears without conflict that the assured had repeatedly and wilfully misrepresented to the insurer, over a period of five months, the actual conditions prevailing at the time of the accident with respect to the identity of the driver of the car. It was held unnecessary to decide the question as to whether an insurer must make a showing of prejudice resulting from the breach of a cooperation clause since, in any event, prejudice sufficiently appeared in that case. It was then held that, as a matter of law, prejudice must be presumed where the uncontradicted evidence disclosed a wilful and substantial breach by the assured of the cooperation clause of the policy, in that material facts had been repeatedly and wilfully misrepresented to the insurer over a considerable period. The court further said: "Nor do we think that preliminary reports of the insurer's investigators tending to indicate a possible lack of defense on the merits to an injured person's claim, precludes the insurer from availing itself of a defense based on a substantial breach of the cooperation clause. We are not now in a position to conjecture as to what settlement or defense on the merits the insurer may have worked out had it been originally fully and truthfully advised by the assured and had it not been forced to withdraw because of its assured's false statements."

[3] While the facts are slightly different, we are unable to see any difference in principle between that case and the instant case. Under the terms of the policy here in question Mrs. Levar became one of the assured. It became her duty, as well as that of her husband, not only to report the accident but to cooperate with the appellant by making a fair and frank disclosure of such information as they possessed concerning the facts in connection with the accident. It appears without contradiction that that duty was not performed. Where an insurer is deprived of the benefit of such material information there is no difference in principle whether this results from a wilful misstatement of the facts or from a wilful failure to give any facts at all, accompanied by such a concealment or hiding out as thwarts the repeated and prolonged efforts of the insurer to locate the assured and to obtain the desired information.

[4, 5] Nor can it be said, under such circumstances, that there remains a question of fact as to whether the appellant was prejudiced. No prejudice may have resulted from the mere failure to make a written report as called for by the policy, since the appellant learned of the injured party's claim within about a week and began an investigation. But that investigation must necessarily have been hampered, and could not possibly have been complete, without such information as Mrs. Levar could and should have furnished. If she was intoxicated at the time of the accident, that fact does not, as respondent suggests, conclusively show that no defense existed and that no prejudice resulted. A violation of that, or any, provision of the Vehicle Code, St.1935, p. 93, on the part of Mrs. Levar, may not have been the proximate cause of the accident. If it be assumed that any information which could have been furnished, in response to the appellant's request, would have disclosed or led to the discovery of the fact that no defense existed, that very fact would have shown the desirability of settling the claim. The then attorney for the respondent had offered to take $2,000 in settlement, and it is entirely possible that an even better settlement might have been obtained. In our opinion, prejudice sufficiently appears from the uncontradicted facts of this case, and again it is not necessary to decide whether, in a case of this character, an insurer must affirmatively show that prejudice has resulted from the breach of a co-

operation clause. Under these circumstances it must be said here, as in the Valladao case, that "as matter of law prejudice must be presumed (if prejudice be essential to the insurer's defense) from the substantial and wilful breach by the assured of the material cooperation clause of the policy."

For the reasons given the judgment is reversed with directions to enter a judgment in favor of the appellant.

We concur: MARKS, J.; GRIFFIN, J.

---

33 Cal.App.2d 145

## WILLIS v. HOLBACK et al.

Civ. 11023.

District Court of Appeal, First District, Division 2, California.

May 31, 1939.

**1. Deeds 🔑196(1)**

In action to quiet title, all presumptions were in favor of validity of deeds through which defendant's title was deraigned, where deeds appeared to be entirely regular, and they were all duly recorded. Code Civ.Proc. § 1963, subds. 1, 15, 19, 20, 39.

**2. Deeds 🔑196(1)**

In action to quiet title, presumptions in favor of validity of deeds through which defendant's title was deraigned remained as evidence and were sufficient to support findings that plaintiff never had any interest in property and that defendant was the exclusive owner thereof, even though conflicting testimony of defendant's predecessor may have been uncontradicted by other direct evidence, where predecessor testified that she had signed a blank deed without any consideration or purpose, that she never otherwise disposed of property, and that she did not claim any interest therein.

**3. Quieting title 🔑44(1)**

In action to quiet title where plaintiff claimed under a sheriff's deed and defendant's title was deraigned through regular deeds which were all duly recorded, plaintiff had burden of proof.

**4. Evidence 🔑594**

The trial court was justified in rejecting testimony of plaintiff's witness on ground that she did not swear credibly, even though her testimony may have been uncontradicted by other direct evidence.

**5. Quieting title 🔑47(2)**

In action to quiet title, where trial court found that plaintiff claiming title under sheriff's deed never had any right, title, or interest in property and that defendant whose title was deraigned through regular deeds which were all duly recorded was the sole and exclusive owner thereof, it was not necessary for trial court to make detailed findings concerning validity of each conveyance in defendant's chain of title.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Erwin D. Willis, also known as Ervin D. Willis, against Leah Holback and others to quiet title to certain realty, wherein Angie Avery, one of the defendants, filed a cross-complaint. From a judgment decreeing that plaintiff had no right, title, or interest in the realty, and quieting title in the cross-complainant, plaintiff appeals.

Affirmed.

Russell W. Cantrell, of San Francisco, for appellant.

Rea, Free & Jacka and Irvin A. Frasse, all of San Jose, for respondent.

SPENCE, Justice.

Plaintiff brought this action to quiet title to certain real property situated in Santa Clara county. The trial court entered its judgment decreeing that plaintiff had no right, title or interest in said property and quieting title in defendant and cross-complainant Angie Avery, hereinafter called the defendant. Plaintiff appeals from said judgment.

The real property was originally owned by Leah Holback, who deeded said property to Katherine Girard. Defendant derived her title through conveyances from Katherine Girard to John Edward O'Brien and from said John Edward O'Brien to defendant. Plaintiff is a judgment creditor of Leah Holback, and subsequent to the time that Leah Holback conveyed to Katherine Girard, plaintiff twice sought to satisfy his judgment by levying execution on the right, title and interest of said Leah Holback in said property, claiming that said conveyance from Leah Holback to Katherine Girard was fraudulent.

After the first levy of execution in 1931, Katherine Girard brought an action to quiet title against this plaintiff and also against Leah Holback. This plaintiff there claimed that said deed from Leah Holback to Katherine Girard had not been delivered, that there had been no consideration therefor and that it was made to defraud this plaintiff as a creditor. The trial court in that action found against all of this plaintiff's claims. Judgment was entered therein in favor of Katherine Girard and said judgment was affirmed on appeal. Girard v. Leah Holback and Ervin D. Willis, 217 Cal. 785, 21 P.2d 420.

A second levy of execution was made in March, 1935, and a sale was had thereunder. This plaintiff was the purchaser at said sale. This action was filed in 1936 and plaintiff claimed title under the sheriff's deed. The deed from John Edward O'Brien to defendant was recorded in 1935 and after the said execution sale had taken place.

Katherine Girard filed a disclaimer in this action and appeared as a witness for plaintiff. She related a rather amazing story which the trial court refused to believe. As stated in a memorandum opinion, the trial court said: "Without this testimony of Katherine Girard, there could be but one result of this case. The title of the cross-complainant, Avery is direct and clear. * * * Frankly expressing itself, the Court does not believe her (Katherine Girard's) testimony. * * * This witness swore, but she did not swear credibly." The trial court then mentioned the previous action in which Katherine Girard had successfully asserted her title against this plaintiff and Leah Holback and then said: "Yet, on the trial of the present case, this witness would have the Court believe that she signed a blank deed, at the simple request of Leah Holback, without any argument or impulsion, without any consideration, and without any reason or purpose; that the official notarial certificate was fraudulent; that she never otherwise sold or disposed of the property; and that she does not now claim any interest therein. If her story of the O'Brien deed is true, she is still the owner of the property; and her disclaimer of any interest therein is inconsistent with her story. * * * In short, this Court is asked to believe that she is telling the truth now, because she was false in her previous actions. This the Court is unwilling to do." The trial court therefore made findings in favor of the defendant and entered its decree accordingly.

[1-4] Plaintiff makes certain points relating to the claimed invalidity of the deed from Katherine Girard to John Edward O'Brien. These points need not be considered at length as they all assume the truth of the evidence of said Katherine Girard, which evidence was rejected by the trial court. Defendant's title was deraigned through deeds which appeared to be entirely regular and they were all duly recorded. All presumptions were in favor of the validity of said deeds. Barry v. Sutter, 26 Cal.App. 240, 146 P. 527; 9 Cal. Jur. 217, sec. 99; see, also, Code Civ.Proc., sec. 1963, subds. 1, 15, 19, 20, 39. The most that can be said is that the evidence of Katherine Girard was in conflict with said presumptions but said presumptions remained as evidence and were sufficient to support the findings even though the evidence of said Katherine Girard may have been uncontradicted by other direct evidence. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. Furthermore, the burden of proof was on plaintiff who depended solely upon the evidence of said Katherine Girard. The trial court rejected her testimony and was justified in so doing. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; see, also, Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; Bohn v. Gruver, 111 Cal.App. 386, 295 P. 891.

[5] Plaintiff further contends that the findings are incomplete but we are of the opinion that the trial court's findings covered all of the material issues. The trial court found that plaintiff never had any right, title or interest in the property and that defendant was the sole and exclusive owner thereof. It was not necessary in this action to quiet title for the trial court to make detailed findings as to the validity of each conveyance in defendant's chain of title.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 90

### JOHNSTON v. JOHNSTON.

Civ. 11039.

District Court of Appeal, First District, Division 2, California.

May 26, 1939.

1. **Divorce** ⟹286

The record in wife's appeal on judgment roll alone from interlocutory divorce decree awarding her lump sum in lieu of interest in community property shows no prejudicial error, as appellate court must assume that there was evidence, stipulations, or agreements warranting such award and cannot say that amount thereof was equivalent to less than half of such property. Civ.Code, § 146.

2. **Appeal and error** ⟹907(2)

Where record on appeal is silent as to evidence, stipulations, or agreements actuating trial court's decision, all presumptions are in favor of validity of judgment appealed from.

---

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Suit for divorce by Marie Johnston against Amedee Johnston. From an interlocutory divorce decree awarding plaintiff a lump sum in lieu of alimony, maintenance, support, and interest in community property, she appeals.

Affirmed.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by plaintiff upon the judgment roll alone from an interlocutory decree of divorce. It was adjudged by said interlocutory decree that plaintiff was entitled to a divorce upon the ground of extreme cruelty and on this appeal, plaintiff's attack is directed solely at the portion of the decree dealing with the community property.

The trial court found that plaintiff and defendant had "a community interest" in certain household furniture and a one-story bungalow in the town of El Varano. In dealing with the property rights of the parties, the trial court found and concluded that "plaintiff is entitled to the sum of Five Hundred Dollars ($500.00) which said sum is to be paid by defendant to plaintiff in lieu of plaintiff's right to any alimony, maintenance and support and in lieu of plaintiff's right to any interest in the community property * * *", and "that upon the payment of said sum of Five Hundred Dollars ($500.00) by defendant to plaintiff, all of the right, title and interest in and to the above described real and personal property is awarded to defendant". The interlocutory decree was entered accordingly.

[1, 2] Plaintiff contends that as the interlocutory decree was awarded to her upon the ground of extreme cruelty, she was entitled to at least one-half of the community property. Civ.Code, sec. 146. We are of the opinion, however, that the record before us fails to show any prejudicial error on the part of the trial court in dealing with the community property. The appeal is taken solely upon the judgment roll and no reporter's transcript or bill of exceptions is before us. As was said in Ramacciotti v. Ramacciotti, 131 Cal.App. 191, 20 P.2d 961, 963, "The record is silent as to the evidence, stipulations, or agreements, if any, that actuated the trial court in its decision," and "all presumptions must be in favor of the validity of the judgment".

For aught that appears in the record before us, the real and personal property may have been of little value, it may have been encumbered and there may have been other community debts. It has been held that "The community property to be distributed upon a dissolution of the community by divorce is the residue which remains after the discharge of the community obligations." Farmers' Exchange Nat. Bank v. Drew, 48 Cal.App. 442, 450 and 451, 192 P. 105, 108; see, also, Frankel v. Boyd, 106 Cal. 608, 39 P. 939. Under various circumstances, an award of money to the wife in lieu of her interest in the real and personal property of the community has been sustained. Webster v. Webster, 216 Cal. 485, 14 P.2d 522; Marshall v. Marshall, 196 Cal. 761, 239 P. 36; Meyer v. Meyer, 184 Cal. 687, 195 P. 387; Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86.

We must assume that there was evidence, or perhaps stipulations or agreements, before the trial court which warranted the award of a lump sum to plaintiff in lieu of her interest in "the community property to be distributed". There is nothing to show that the amount awarded was equivalent to less than half of such community property. As was said in Webster v. Webster, supra, 216 Cal. at page 489, 14 P.2d at page 523, "In the absence of the evidence it is, of course, impossible for us to say that the court below awarded less than one-half of the community property to the plaintiff, or otherwise erred or abused its discretion in awarding the same."

The interlocutory decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

33 Cal.App.2d 107

## SCHRANK v. STERLING PRODUCTS CO.

Civ. 12132.

District Court of Appeal, Second District, Division 2, California.

May 29, 1939.

Hearing Denied July 27, 1939.

**1. Contracts 🔑147(3)**

In determining intention of parties under written contract, the whole contract is to be taken together so as to give effect to every part thereof if reasonably practicable. Civ.Code, §§ 1639, 1641.

**2. Patents 🔑218(5)**

Where exclusive sublicense to manufacture a device provided that sublicensee agreed to pay to sublicensor every month "any sums on account of minimum royalties required to be paid hereunder in accordance with the provisions hereinafter contained" and following paragraph provided that if sublicensee should fail to pay certain minimum royalties the sublicensor might cancel agreement, the sublicensee was liable for minimum royalties, as against contention that agreement merely gave sublicensor right to cancel agreement for failure to pay minimum royalties. Civ.Code, §§ 1639, 1641.

**3. Patents 🔑219(1)**

Where original agreement licensing manufacture of a device required licensee to pay attorney's fees in case it became necessary for licensor to commence action thereon, but sublicense contained no such provision, sublicensee was not liable for attorney's fees, notwithstanding sublicense made certain references to original licensing agreement which was attached to the sublicense.

**4. Patents 🔑213**

Where original agreement licensing manufacture of a certain device provided that assignment thereof without licensors' consent should at licensors' option work a forfeiture of agreement, sublicense made without original licensors' consent would be only voidable at option of original licensors and not void.

**5. Patents 🔑213**

Where original agreement licensing manufacture of a certain device provided that assignment thereof without original licensors' consent should at their option work a forfeiture of agreement, failure of licensee to obtain written consent of original licensors to sublicense would not preclude recovery of minimum royalties from sublicensee, where original licensors had not exercised option to terminate license agreement.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action for royalties under a licensing contract by Elsie D. Schrank against the Sterling Products Company. Judgment for plaintiff, and defendant appeals.

Judgment modified, and, as modified, affirmed.

Collins Mason, H. B. Cornell, and Freston & Files, all of Los Angeles, and Ralph E. Lewis, of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, and William J. M. Heinz, of Anaheim, for respondent.

WOOD, Justice.

In this action plaintiff recovered a judgment in the sum of $11,117.32, the amount found to be due as minimum royalties under an agreement whereby plaintiff gave defendant a license to manufacture and sell a device useful in sand papering and polishing. This device is referred to by the parties as a "sander".

The original owners of the patent, Drennon, Heinz and Ganahl, entered into an agreement in writing with Roscoe V. Porter and George S. Bean under date of March 18, 1933, whereby Porter and Bean were given an exclusive license to manufacture and sell the sander and Porter and Bean agreed to pay them the sum of $1.50 for each sander sold. The contract provided for the payment of attorney's fees in case it became necessary for the owners to commence action thereon and also provided that the licensees would pay a minimum royalty of $150 per month. It was also provided that the contract could not be assigned by the licensee without written consent of the owners and that an assignment without the consent of the owners would work a forfeiture of the contract at the option of the owners.

Under date of April 14, 1934, Porter and Bean entered into an agreement in writing with defendant, whereby Porter and Bean gave defendant an exclusive license to manufacture and sell the sander and in which it was provided that defendant would pay to Porter and Bean the sum of seventy-five cents for each sander sold by defendant and in addition the sum of $1.50 for each sander sold, the sum necessary for Porter and Bean to pay under their agreement with the owners. Both contracts, the one dated March 18, 1933, and the one dated April 14, 1934, contain many provisions stated in detail which are different in many respects, but which for the purposes of this appeal it is not necessary to discuss. References to the earlier agreement are made in the second agreement, which sets forth, "a copy of which said license agreement is attached hereto, marked Exhibit I and hereafter referred to and made a part hereof". Plaintiff sues as the assignee of Porter and Bean.

The parts of the later agreement which bind defendant to pay royalties are found in paragraphs IX and X. Paragraph IX provides: "Sterling agrees: * * * (c) To pay to Licensors, on or before the 10th day of each and every month * * * any sums on account of minimum royalties required to be paid hereunder in accordance with the provisions hereinafter contained." Paragraph X provides: "It is Mutually agreed and Understood as Follows: (a) Should Sterling fail to pay to Licensors on August 10, 1934, a minimum royalty of one hundred dollars ($100.00) and beginning with September 10, 1934, a minimum royalty of one hundred fifty dollars ($150.00), for each and every month during the existence of this agreement, and an additional minimum royalty of four hundred fifty dollars ($450.00) for each and every quarter year, beginning with nine (9) months from the date of this agreement and continuing during the existence of this agreement, the Licensors may cancel this agreement by giving the Sterling sixty (60) days notice in writing. * * *"

Defendant makes a definite and clear agreement in paragraph IX (c) of the contract to pay such sums on account of minimum royalties as may be provided in subsequent portions of the contract. These sums are designated in paragraph X, the only place where the subject is treated. Defendant claims that paragraph X gives Porter and Bean the privilege of canceling the agreement upon defendant's failure to pay minimum royalties therein provided for but does not by its language obligate defendant to pay such royalties; that the payment of minimum royalties is entirely optional with defendant. If this contention should be sustained it would render nugatory the agreement to pay minimum royalties contained in paragraph IX (c), and also paragraph X (b), which provides for the termination of the agreement by defendant upon giving notice. Under defendant's argument the contract could be terminated by defendant by merely ceasing to manufacture or sell the sanders, the terms of the contract which set forth the manner of giving notice not having any binding effect. At the time of the making of the later contract the earlier contract was before the parties and was specifically referred to on certain points and attached as part of their agreement. Both parties knew that Porter and Bean were obligated to pay $1.50 for each sander sold with a minimum royalty of $150 per month. With this knowledge before them Porter and Bean gave defendant an exclusive license to manufacture and sell the sander by paying an additional seventy-five cents as royalty for each sander sold. It is not reasonable to contend that the parties intended that Porter and Bean would remain liable to the owners for the minimum royalty of $150 per month with no obligation on the part of defendant to pay any minimum royalty whatever and, indeed, to pay no sum whatever in case no sanders should be sold.

[1, 2] In determining the intention of the parties from their written contract, which we are required to do under the provisions of section 1639 of the Civil Code, the whole contract is to be taken together, so as to give effect to every part thereof if reasonably practicable. Sec. 1641, Civ.Code. The trial court correctly took the view that it was the intention of the parties, as expressed in paragraph IX

and X of the contract, to make defendant liable for the minimum royalties.

[3] Defendant's contention that the trial court erred in awarding attorney's fees to plaintiff must be sustained. The earlier contract provided that the owners of the patent, Drennon, Heinz and Ganahl, could recover attorney's fees from Porter and Bean but no such provision appears in the contract made by Porter and Bean and defendant. Although the original contract was attached to the later contract because of certain references thereto contained in the later contract, no language appears in the later contract which makes defendant liable for all the obligations of Porter and Bean to the owners of the patent or which makes defendant liable to pay attorney's fees to Porter and Bean in case action should be commenced to enforce the terms of the contract sued upon.

[4, 5] It is further contended by defendant that plaintiff may not recover because of the failure of Porter and Bean to obtain the written consent of the owners of the patent to an assignment of the license rights. Plaintiff argues not only that it was established that the consent of the owners had been obtained in writing but also that a failure to obtain such consent would not prevent a recovery. It is provided in paragraph XV of the agreement of March 18, 1933; "It is agreed that this contract shall not be assigned by Licensee without the written consent of the Owner, and that an assignment thereof without the consent shall at the option of the Owner work a forfeiture of this contract." It is expressly provided in the contract made by the owners that the owners had the option of forfeiting the contract in case of the making of an assignment without their consent. It is clear that any assignment made contrary to the provisions of paragraph XV of the earlier contract would be only voidable at the option of the owners and not void as defendant contends. No showing was made that the owners exercised their "option" to declare a forfeiture. It is not necessary, therefore, to pass upon the contention that consent in writing to the assignment was in fact obtained.

The judgment is modified by striking therefrom the sum of $479.14, the amount of the attorney's fees awarded, and as so modified it is affirmed. Neither party is to recover costs on appeal.

We concur: CRAIL, P. J.; McCOMB, J.

---

33 Cal.App.2d 112

## WALL v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

Civ. 12147.

District Court of Appeal, Second District, Division 2, California.

May 29, 1939.

**1. Insurance 🔑177**

Payment of first quarterly premium on 10-year term life insurance policy after date specified therein as beginning of term did not extend coverage until date 10 years after date of such payment on theory that insured thereby obtained insurance for three months after latter date, though policy provided that it should not take effect until first premium was paid, where it also provided that payment of any premium should not maintain policy in force beyond date on which succeeding premium became payable, which was in month after such payment.

**2. Insurance 🔑177**

Under life insurance policy obligating insurer to pay stated sum in event of insured's death before certain date, insurer was not liable for death benefits, where insured died after such date.

**3. Insurance 🔑146(1)**

While it is primarily trial court's duty to construe life insurance contract in action to recover damages for failure to pay death benefits thereunder, construction thereof must be reasonable and fair interpretation of language used.

**4. Appeal and error 🔑1008(3)**

When appeal depends solely on construction of language of contract from instrument itself, reviewing court must determine meaning thereof as matter of law, and rule precluding appellate court from disturbing trial court's determination supported by substantial evidence is inapplicable.

**5. Appeal and error 🔑1008(3)**

The construction of term life insurance contract is law question for appellate court on appeal from order granting plaintiff new trial after judgment for defendant in action to recover damages for failure to pay death benefits under such contract, where facts were undisputed.

**6. New trial 🔑27**

A new trial may be granted only when matters specified as grounds therefor in statute materially affect moving party's substantial rights. Code Civ.Proc. § 657.

**7. New trial** ⇐27

In action to recover damages for failure to pay death benefits under term life insurance policy, order granting plaintiff new trial after judgment for defendant was unauthorized, where insured admittedly died after expiration of specified term, as judgment for defendant was required in any event. Code Civ.Proc. § 657.

McCOMB, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action at law by Ella Wall against the Equitable Life Assurance Society of the United States to recover damages for failure to pay death benefits under a life insurance policy. From an order granting plaintiff's motion for a new trial after judgment for defendant, the latter appeals.

Reversed.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for appellant.

Lawler, Felix & Hall, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the defendant from an order of the superior court granting plaintiff's motion for a new trial after judgment for the defendant.

The action is one at law, not in equity, for the recovery of damages for failure to pay death benefits upon a life policy—not one for the reformation of a contract. No contention is made by the plaintiff that the contract of insurance is ambiguous; in fact, she contended at the trial and again in the oral argument before this court that it is not ambiguous, and that none of the surrounding circumstances are admissible in evidence for the purpose of interpreting it.

One of the contentions of the defendant is that the defendant agreed to pay the death benefits "in the event of the death of the insured prior to the 12th day of September, 1936"; that it was established by the pleadings of the plaintiff and the findings of fact that the decedent died October 1, 1936, and that therefore the defendant was not obligated to pay the death benefits; that the defendant was entitled to judgment upon the interpretation of the contract of insurance, and therefore the court erred in granting the motion for a new trial.

The action was brought upon a term policy of insurance on the life of Frank L. Whipple in which the plaintiff was named beneficiary. The parts of the contract necessary for a discussion of the question involved are as follows. "The Equitable Life Assurance Society of the United States hereby insures the life of Frank L. Whipple (herein called the insured) for the term of ten years, and agrees to pay at its home office in the city of New York Three Thousand Dollars (the face of this policy) in the event of the death of the Insured prior to the twelfth day of September Nineteen hundred and thirty-six. * * * This insurance is granted in consideration of the payment in advance of Twelve and 81/100 Dollars and of the payment quarterly thereafter of a like sum upon each twelfth day of December, March, June and September during the term of ten years, or until the prior death of the Insured." Suicide "within one year from the date of issue hereof, is a risk not assumed by the Society under this policy". The privilege of exchanging the policy for an ordinary life policy is limited in time to seven years from "the register date hereof", rather than from the date of issue. The register date of the policy is given as September 12, 1926.

Also, as a part of the policy and attached to the same were three applications, the first of which read as follows: "I hereby apply for a policy on my life for $3,000.00 for the benefit of my mother * * * The policy to be on the 10 year Term plan. * * * I hereby agree that the policy issued hereon shall not take effect until the first premium has been paid." In this application Mr. Whipple stated that he was born "on the 12th day of March, 1883. My insurance age at nearest birthday is therefore 43 years." Notwithstanding that a second and a third application were executed by Mr. Whipple in October and November, respectively, each of said applications was dated back to September 11, 1926, and in both of said applications he stated, "My insurance age at nearest birthday is therefore 43 years." In both of these applications he requested that the term policy be issued with quarterly premiums of $12.81, which was the established quarterly premium for this type of policy issued on the basis of age at nearest birthday being 43 years, while if issued on the basis of age at nearest birthday being 44 years, the established quarterly premium rate would be higher.

The policy was dated November 19, 1926, but, as already stated, bore a register date of September 12, 1926, and thereon the age of the insured was specified as 43 years.

The policy provided for participation in the visible surplus and that such dividend should be payable annually "beginning at the end of the second insurance year and on each anniversary thereafter". The amount of each of the annual dividends payable on this policy issued on the basis of Mr. Whipple's age at nearest birthday being 43 years would be greater than if the policy had been issued as nearest birthday being 44 years.

The insured paid the first premium between November 2 and 6, 1926, and thereafter paid all of the remaining quarterly premiums required under the policy. The insured died within ten years of date of issuance of the policy and within ten years of first payment of premium, but after September 12, 1936. Judgment went for the defendant, and thereafter upon motion of the plaintiff a new trial was granted, and it is from this order granting a new trial that the appeal is taken.

[1] In our interpretation of the contract its language means exactly what it says when it says that defendant agrees to pay the insurance "in the event of the death of the insured prior to the 12th day of September, 1936". The policy was founded "on the ten year term plan", with the insured's age at nearest birthday stated as 43 years, and the last date such a policy could be made applicable to the insured was September 12, 1926, and the ten years insurance referred to in the policy was a period from September 12, 1926, to September 12, 1936.

It is the contention of the plaintiff that since the policy provided that "It shall not take effect until the first premium has been paid," and since the premium was not paid until November, 1926, and since the policy was for ten years, that this extended the coverage until November, 1936. This contention is based on the unauthorized assumption that the payment of the initial premium of $12.81 obtained for Mr. Whipple insurance for three months following the date of said payment. The assumption, however, is contrary to the express agreement of the parties as contained in the policy. The policy expressly provides that "the payment of any premium or installment thereof shall not maintain this policy in force beyond the date when the succeeding premium or installment thereof becomes payable". The succeeding premium became payable December 12, 1926, and therefore, though the first premium was paid in November it did not continue the insurance beyond December 12, 1926. Jackson v. Washington National Ins. Co., 13 Cal.App.2d 254, 257, 56 P.2d 1264; Schick v. Equitable Life Assurance Society, 15 Cal.App.2d 28, 59 P.2d 163. We cannot by construction read out of the policy this plain provision contained in it. Such agreement, if the initial premium was paid at a later date than the agreed registered date of the policy, resulted in the insurer receiving compensation during which no liability was imposed upon it. On the other hand, upon delivery of the policy and the payment of the first premium, the insured secured those advantages which flowed from having the policy become effective as of the earlier date. Rosenthal v. New York Life Ins. Co., 8 Cir., 94 F.2d 675, 680. There is no language in the record which would reasonably justify the contention that the insured did actually get a full three months' coverage for the first premium. On the contrary, it is clear upon the express terms of the contract that he would be short the period between the registered date of the policy and the date of delivery and payment. The cases cited by plaintiff are distinguishable in this respect. In the cases cited by respondent which set out the terms of the policy we find language which would infer that the insured was to get a three months' coverage for the first quarterly premium.

In the case of Shira v. New York Life Ins. Co., 10 Cir., 90 F.2d 953, 954, a very similar contract to the one before us was interpreted by the court. The policy contained the provision that it should not take effect "until the policy is delivered to and received by the applicant and the first premium thereon paid". The plaintiff in that case made the same contention as does the plaintiff in this case. The court said: "The provision in the application does not fix the effective date of the insurance contract. It simply imposes a condition precedent to the taking effect of the insurance coverage. * * * The condition in the application and the provision in the policy proper as to its effective date are not in conflict. When read together, they mean that the insurance coverage shall only take effect in the event the conditions specified in the application are fulfilled, and then as of January 2, 1930." (Citing numerous authorities in support of its decision.) In New York Life Insurance Company v. Silverstein, 8 Cir., 53 F.2d 986, 989, the court said: "There is no real inconsistency between these above-quoted provisions in the policy and the provision in the application to the effect that the policy should not take effect until its delivery and the payment of the first premium. The policy definitely provides that the premiums following the first shall be due on definite dates, or at the expiration of definite periods. These contract provisions must control." See, also, Travelers Insurance Co. v. Wolfe, 6 Cir., 78 F.2d 78, 80.

The facts extrinsic to the writing itself introduced by plaintiff do not tend to establish a right in plaintiff to recover under this policy for the death of Mr. Whipple on October 1, 1936. On the contrary, they tend to establish the express conditions of the policy that defendant should be liable only in the event that Mr. Whipple died prior to September 12, 1936, for they disclose Mr. Whipple's desire to have the term policy, when issued, relate back to September 12, 1926, so as to take advantage of the lower age at nearest birthday and consequent lower premium. Mr. Whipple in his first application stated that he was born March 12, 1883, and that his insurance age at nearest birthday was 43 years, and he specifically stated the quarterly premium on the term policy, namely $12.81. This application was not forwarded to defendant until on or after October 1, 1926, and reached the defendant's home office in New York City on October 11, 1926, as is established by the stipulation introduced by plaintiff. It was obvious to Mr. Whipple that his policy could not be issued on or prior to September 12, 1926, which was the last date upon which his age at nearest birthday was 43 years. That Mr. Whipple desired the policy to relate back and issue as of age at nearest birthday being 43 years is also confirmed by his second and third applications. The second application was sent by him some time after October 16, 1926, and the third application was signed by him some time after November 19, 1926, but he dated both applications back to September 11, 1926, and in both he stated that his age at nearest birthday was 43 years and requested that the policy be issued with quarterly premiums of $12.81. When Mr. Whipple sent the second and third applications, his age at nearest birthday was 44 years, and had he desired a policy expiring ten years after the date he signed them, such policy necessarily would have been issued on the basis of his age at nearest birthday being 44 years.

[2] The only obligation in the policy for the payment of death benefits is found in the first sentence on the face of the policy, which reads that the defendant "agrees to pay at its home office in the City of New York Three Thousand Dollars in the event of the death of the Insured prior to the twelfth day of September Nineteen hundred and thirty-six". It is an admitted fact in the case and an established one that Mr. Whipple did not die prior to September 12, 1936, and therefore the event upon which the payment of $3,000 was expressly conditioned never occurred and no liability exists.

[3-5] The plaintiff contends that it is primarily the duty of the trial court to construe the contract. This is true, but the construction placed upon it must be reasonable. It must be a fair interpretation of the language used. George Herz & Co. v. Solt, 23 Cal.App.2d 178, 72 P.2d 251. "When an appeal depends solely upon the construction to be given to the language of a contract from the instrument itself, the reviewing court is called upon to determine the meaning thereof as a matter of law. Under such circumstances, the rule on appeal which precludes the appellate court from disturbing the determination of the trial court when there is substantial evidence to support its conclusions has no application." Texas Co. v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180, 1185. Under the undisputed facts in the present case, the construction of the contract is a question of law for this court to determine on appeal.

[6, 7] In section 657 of the Code of Civil Procedure the matters which are therein specified as grounds for a new trial apply only when the moving party is aggrieved, and a new trial may be granted only when such matters materially affect

the substantial rights of the moving party. In this case a judgment in favor of the defendant was required in any event. It is clear that the plaintiff was not aggrieved and that the alleged errors upon which the plaintiff sought a new trial did not materially affect her substantial rights. The order granting a new trial was unauthorized. Bechtel v. Chase, 156 Cal. 707, 712, 106 P. 81; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 478, 168 P. 1037.

The order is reversed.

I concur: WOOD, J.

McCOMB, Justice.

I dissent. As pointed out in the majority opinion, the contract which is the basis of the present litigation insured the life of Frank L. Whipple "for the term of ten years". The insurance was not to "take effect until the first premium" had been paid. (The first premium was actually paid between November 2 and 6, 1926.)

The contract also provided that, "in the event of the death of insured prior to the 12th day of September, 1936", the insurer would pay the face value of the policy to the named beneficiary.

Frank L. Whipple died October 1, 1936, which was within ten years from the date of the payment of the first premium and the issuance of the policy, but, of course, subsequent to September 12, 1936.

The majority opinion indicates that the policy was not ambiguous upon its face. This position is based upon the fact that both plaintiff and defendant have contended that the policy was unambiguous. The fallacy in this argument is:

First: In assuming that, since the parties do not concede the contract to be ambiguous but contend for differing constructions, the result is that the contract is unambiguous. It is similar to a situation where three men are in a room, one of them is blind, the other two look out of a window, and one man says, "I see a white horse on the street." The second man says, "It isn't a white horse; it is a black horse." As far as the blind man is concerned, it is entirely ambiguous to him whether it is a white horse or a black horse, in spite of the fact that the other occupants of the room state in the most positive terms their views of the horse's color.

Second: The majority of the court, by applying certain rules of construction, have arrived at what they believe to be a correct interpretation of the policy. Therefore, they reason that it follows as a matter of course that the policy was unambiguous.

Such reasoning is similar to a case where (taking the example above of three men in a room) a fourth man enters the room and at the request of the blind man looks out of the window and informs him that the horse is in fact white, for the blind man to then say that there never was any doubt in his mind as to the color of the horse, because he now knows its color.

The mere fact that it has become necessary for the majority of the court to resort to rules of construction to determine the meaning of the contract is convincing to me that the contract is in fact ambiguous.

Assuming, as I do, that the contract is ambiguous, the majority opinion disregards two long established rules of appellate procedure in this state:

First: On an appeal from an order granting a motion for a new trial on the ground of insufficiency of the evidence to support the judgment, an appellate court, assuming that there is a substantial conflict in the evidence, will not set aside the order of the trial court granting the motion for a new trial.

Second: It is for the trial court in the first instance to construe ambiguous terms in a contract and, until so construed and the accuracy of the determination of the trial court is questioned directly on appeal, an appellate court will not in the first instance undertake to construe the ambiguous provisions in the contract.

In Barlow v. Frink, 171 Cal. 165, at page 172, 152 P. 290, at page 292, the rule is thus stated by our Supreme Court:

"* * * Whether a contract is in any of its terms or provisions ambiguous or uncertain is a matter of determination in the first instance by the trial court. If it is found so to be, it is primarily the duty of the trial court to construe it after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto. Until it is so construed by the trial court, with this opportunity afforded to the parties, and the accuracy of the determination of the trial court is directly questioned on appeal here, we do not think we should in the first instance undertake to construe it, and have our determination of the matter operate as the law of the case on a new trial."

It is likewise settled that, where a writing is uncertain and either of two constructions may be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by another construction of which the instrument is susceptible.

In Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34, 37, Mr. Justice Curtis thus states the rule:

"* * * The construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case the appellate court will not substitute another interpretation, though it seem equally tenable."

Again in McNeny v. Touchstone, 7 Cal.2d 429, at page 435, 60 P.2d 986, at page 989, the same learned justice says:

"This construction appears to be consistent with the intent of the parties, and where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties, the appellate court will not substitute another construction although it seem equally tenable. Kautz v. Zurich etc. Ins. Co., Ltd., 212 Cal. 576, 300 P. 34; Farmers' & Merchants' Nat. Bank v. Bailie, 138 Cal.App. 143, 149, 32 P.2d 157; Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25; Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710, 713. In the last-mentioned case the court elaborates upon the above rule in the following manner: 'On the other hand, if the contract is ambiguous, so that there might be two possible constructions, then we agree with the respondent that the law as set forth in 6 California Jurisprudence 327, and also in the case of Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25, applies. Hence, if the construction given by the trial court is one which is tenable, and one which appears to us consistent with the true intent and meaning of the parties, it would not lie within the province of an appellate court to set aside the judgment of the trial court and substitute its own interpretation, simply because another interpretation thereof is also possible.'"

To the same effect see, also, Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 101, 44 P.2d 670; Hale v. Harbor Petroleum Corp., 139 Cal.App. 455, 462, 33 P.2d 1039; Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710; Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 563, 161 P. 25.

In the present case it is clear to me that the instrument is ambiguous and the trial court has not as yet placed any construction thereon. Therefore, this court should not undertake, in view of the above authorities, in the first instance to construe the meaning of the ambiguous provisions in the document.

In my opinion the order appealed from should be affirmed.

## PEOPLE v. PIERCE et al.

## SAME v. SIKORA et al.

Cr. 3172, 3186.

District Court of Appeal, Second District, Division 2, California.

May 29, 1939.

Hearing Granted June 26, 1939.

**1. Indictment and Information 🔑110(4)**

Where penal statute enumerates several separate and distinct acts, commission of each or any of which constitutes crime, information charging violation of such statute must charge commission of particular act or acts on which crime is based, and it is not sufficient to charge defendant in strict language of statute.

**2. Indictment and Information 🔑71**

A defendant is entitled to be apprised of nature and particulars of crime charged with reasonable certainty by indictment or information, though many offenses may be charged in strict language of statute.

**3. Indictment and Information 🔑125(28)**

An information charging that defendants kept and occupied a room, shed, tenement, tent, booth, building, float, vessel, place, stand and inclosure, with books, papers, apparatus, device and paraphernalia, for purpose of recording and registering bets and wagers and selling pools on results of horse races, was demurrable as charging commission of numerous offenses in same count without being separately stated. Pen. Code, § 337a, subd. 2; §§ 950–952, 954, 1004, subd. 3.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull and A. A. Scott, Judges.

Jack Pierce, Charles Sikora, Margaret Johnson and Carrie Johnston were convicted of keeping and occupying a room, shed, tenement, tent, booth, building, float, vessel, place, stand and inclosure, with books, papers, apparatus, device and paraphernalia, for the purpose of recording and registering bets and wagers and selling pools on the results of horse races, and defendants Sikora and Johnson appeal.

Reversed with direction.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendants were convicted after trial before the court without a jury of violation of subdivision 2, section 337a of the Penal Code. As the above-numbered appeals involve identical questions on analogous facts, both appeals will be considered together in this opinion.

These are the essential facts:

The information charged the defendants with violating subdivision 2, section 337a, of the Penal Code in the following language:

"The said Jack Pierce, Charles Sikora, and Margaret Johnson are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information of the crime of violation of subdivision 2, Section *337a, Penal Code of California,* a felony, committed as follows: That the said Jack Pierce, Charles Sikora, and Margaret Johnson on or about the *15th day of July, 1938,* at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously for gain, hire, reward, gratuitously and otherwise, keep and occupy a room, shed, tenement, tent, booth, building, float, vessel, place, stand and enclosure, and any part thereof, with a book and books, paper and papers, apparatus, device and paraphernalia, for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools and purported pools upon the result and purported result of trial and purported trial and contest and purported contest of skill, speed and power of endurance between beasts, to wit, horses.

"Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California."

Defendants demurred to the information on the ground, among others, that more than one offense was charged in the information, contrary to sections 950, 951, and 952 of the Penal Code and not in conformity with the provisions of section 954 of the Penal Code. This demurrer was overruled and defendants were subsequently convicted.

Defendants rely for reversal of the judgments on this proposition:

*Numerous offenses are charged in the information in one count and are not separately stated as required by the provisions of section 954 of the Penal Code.*

This proposition is tenable.

Section 1004, subdivision 3, of the Penal Code gives as one of the grounds of demurrer to an information:

"That more than one offense is charged, except as provided in section nine hundred and fifty-four."

The exception referred to in the Penal Code section just quoted, to be found in section 954 of the same code, is that an information "may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, *under separate counts* * * *." (Italics added.)

[1] Respondent's contention that the information pleaded the offenses in the language of the statute and is therefore sufficient is without merit, in view of the settled rule in California that where a penal statute enumerates several separate and distinct acts, the commission of each or any of which constitutes a crime, the information must charge the commission of the particular act or acts upon which the crime is based, and it is not sufficient to charge the defendant in the strict lan-

guage of the statute. (People v. Lee, 107 Cal. 477, 480, 40 P. 754; People v. Plath, 166 Cal. 227, 234, 135 P. 954.)

The information charges at least eleven different crimes. These crimes are charged in the *conjunctive;* hence it is impossible to determine which offense the pleader intended to accuse defendant of having committed. For example, was the defendant charged with having kept a tent or building or a vessel for the purpose of unlawfully recording bets, etc.? The information fails to shed any light upon the subject.

[2] In People v. Lee, supra, Mr. Justice Henshaw, speaking for our Supreme Court, says, 107 Cal. at page 480, 40 P. at page 755:

"Criminal proceedings, it is true, have been much simplified by the Codes, and many offenses may now be charged in the strict language of the statute. Nevertheless, there are certain fundamental principles which have neither been abrogated nor modified. A defendant is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal [or conviction], plead his jeopardy against further prosecution. Where, as under some of our statutes, several separate, different, and distinct acts are enumerated, the commission of each or any of which constitutes the crime, it is not sufficient to charge the defendant with being guilty of the crime, without further charging the commission of the particular act or acts upon which the crime is based. A person, for example, charged with vagrancy, is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar,—in short, as belonging to what class, or as having done what act, to lay him liable as a 'vagrom man.'"

[3] Applying the above stated rules of law to the facts of the instant case, it is apparent that the information charged defendants with the commission of numerous offenses in the same count and did not state them in separate counts as is permitted by section 954 of the Penal Code, and that thus the information did not inform defendants of the particular charge they were called upon to meet. Therefore, the demurrer to the information should have been sustained.

For the foregoing reasons the judgments appealed from are and each is reversed, and the trial court is directed to enter an order sustaining the demurrers to the information with leave to the district attorney to file an amended information if so advised.

We concur: CRAIL, P. J.; WOOD, J.

## WILLIAMS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. *

Civ. 12242.

District Court of Appeal, Second District, Division 1, California.

May 31, 1939.

Hearing Granted July 27, 1939.

**1. Certiorari 🔑5(1)**

An order vacating a previous order directing court reporter to proceed with preparation of transcript pursuant to agreement with appellant, declaring such agreement void, and directing reporter to prepare transcript upon consummation of a satisfactory new agreement, was not appealable as a "special order made after final judgment," and hence was reviewable by certiorari. Code Civ.Proc. §§ 274, 963, subd. 2.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

**2. Certiorari 🔑5(1)**

Even where right of appeal from questioned order exists, an appellate court may, in the exercise of its discretion, permit validity of the order to be tested by extraordinary writ, as where the circumstances are aggravated and justify immediate relief.

**3. Certiorari 🔑57**

Where entire record of proceedings was before reviewing court on certiorari, court could review all the facts shown and render such relief as might be proper in the premises.

**4. Certiorari 🔑5(1)**

Where order of superior court, which had jurisdiction of the parties and subject matter, is nonappealable, whether the court acted in excess of its jurisdiction in making such order may be reviewed on certiorari.

---

*For subsequent opinion see 96 P.2d 334.

**5. Appeal and error ⟹607(1)**

The statutes governing transcripts on appeal do not contemplate that after litigant makes a personal arrangement with the reporter for a transcript, the trial court can set aside such arrangement upon application of the reporter and relieve the reporter from performing his duty until appellant shall make other arrangements with the reporter satisfactory to the reporter and the court. Code Civ.Proc. §§ 274, 953a, 953b, 1085.

**6. Courts ⟹481**

The superior court did not have jurisdiction to set aside previous order of another judge directing reporter to prepare transcript pursuant to agreement with appellant, declare such agreement void, and direct reporter to proceed with preparing transcript upon confirmation of a satisfactory new agreement. Code Civ.Proc. §§ 274, 953a, 953b, 1085.

◆

Proceeding on the application of Edna I. Williams against the Superior Court of the State of California, in and for the County of Los Angeles, and all of the judges thereof, to annul an order vacating a previous order of another judge. On petition, demurrer, and certified record of the proceedings.

Demurrer to petition overruled, and order annulled.

Delvy T. Walton and B. R. Ware, both of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Asst. Co. Counsel, both of Los Angeles, for respondent Superior Court.

WHITE, Justice.

This is an application for a writ of review by which the petitioner seeks to have annulled an order made by a judge of the superior court vacating a previous order of another judge of that court. An alternative writ having been issued by this court, the matter is now presented for decision upon the petition, the demurrer of respondent court thereto, and a certified record of the proceedings had in the superior court.

Petitioner is the plaintiff in an action in the superior court wherein, on January 25, 1938, judgment was entered for the defendant, from which judgment petitioner appealed under the so-called "alternative method" (Code Civ.Proc., sec. 953a) and filed with the clerk a request for the preparation of a transcript, stating therein that arrangements had been made personally with the reporters for their compensation for preparing such transcript, as authorized by section 953b of the Code of Civil Procedure.

The present controversy arises out of the failure of the official reporter in the superior court who reported the major portion of the proceedings in the trial of the cause to proceed with the preparation of the transcript in accordance with the terms of an agreement between him and petitioner whereby the reporter agreed to furnish one original and one copy of the reporter's transcript "upon a contingent basis". In substance, the agreement was that should petitioner be successful in her appeal or recover from the defendant either by judgment or by compromise, she should pay the reporter for the transcript at the statutory rate; but in any event the latter should be reimbursed as the work proceeded for the cost of supplies required to prepare the record. From the record before us it appears that this agreement, as subsequently modified (the changes not being here material), was fully performed by petitioner. Almost a year after the entry of judgment, in January, 1939 (the time for preparation of the reporter's transcript having been extended from time to time by order of the trial judge), petitioner secured an order in the order to show cause department of the superior court requiring the reporter to show cause "why he should not be compelled to proceed with the preparation of said record and the performance of his contract for the preparation thereof, and why he should not be suspended from his duties as an official reporter of this court until such record is completely prepared by him and settled by the trial court, * * *". After a hearing the judge in the order to show cause department made an order "that the stenographic reporter * * * be and he is hereby ordered to proceed immediately with the preparation of the balance of the record reported by him in this proceeding * * *". Thereafter a second order to show cause was issued by the same judge; but before the return day of such second order, the reporter himself caused a motion to be filed and presented to the judge who tried the cause (hereinafter referred to as the trial judge), seeking additional time in which to prepare the transcript and also praying for the "abrogation" of the agreement with the petitioner pursuant to which the preparation of the transcript had been undertaken "and the substitution therefor of an agreement which will reasonably compensate your petitioner for the preparation of said transcript". The time of notice of this motion was shortened to one day, and after a hearing and argument thereon, the trial judge entered the order here sought to be annulled, and which is in parts material hereto as follows:

"* * * On January 4, 1939, said Judge Wilson issued an order, which was filed on that day, decreeing not only that said reporter proceed immediately with the preparation of said transcript, but that he specifically perform the aforesaid private agreement between him and the plaintiff.

"It is obvious on the face of the record that said judgment or order of January 4, 1939, was made without jurisdiction. If the proceeding were one properly a proceeding in, and as a part of, the pending case, the defendant, or his attorney, vitally interested in the granting or denying of such motion, was entitled to notice. If the proceeding were one for the specific performance of a personal agreement between Mr. Rappaport and the plaintiff, as the judgment might indicate, it is significant that no complaint was filed against Mr. Rappaport. If the proceedings were intended to be in the nature of mandamus, again no pleadings were filed and no proper process issued. * * *

"Now, therefore, this court on its own motion, and finding said order of January 4, 1939, to be void on the face of the record, and to clarify the situation with respect to the matter of said transcript to the end that an appropriate order, doing justice to all parties may be made, declares said order of January 4, 1939, to be void, vacates the same, and decrees the same to be of no force or effect. * * *

"* * * the court finds, adjudicates and decrees that the said agreement between said Samuel Rappaport and the plaintiff is contrary to public policy, is therefore unlawful, and void and that neither party to it can have or claim any rights, or enforce any remedies, thereunder. * * *

"The court hereby orders that the time within which the reporter's transcript may be prepared and filed shall be and is extended to, and including, the 31st day of March, 1939, with this further provision that if within that time an agreement is arrived at between said plaintiff and said reporter, which is free from any contingency feature, is acceptable to both parties, and provides for compensation within the limits fixed by C. C. P. 274, or if within that time plaintiff gives some assurance to the court of willingness to pay for a transcript at the rate fixed by said section of the Code of Civil Procedure, this court, upon a satisfactory showing of any such arrangement, and in the absence of any good cause appearing to the contrary, will grant a further extension of time of sufficient length to enable the reporter to complete and file said transcript.

"It is the further order of the court that upon consummation of an agreement in accord with the most recent proposal of said Rappaport as hereinabove recited, or upon payment, or reasonable assurance of payment, in accord with C. C. P. 274, the said Rappaport shall, and is hereby ordered to, proceed with all reasonable diligence to prepare said transcript and shall continue at such work with all due diligence until its completion.

"This court retains such jurisdiction as it may lawfully have of all matters pertaining to the preparation of said transcript to the end that any further appropriate orders may be made upon proper notice and in the interests of fairness to all parties involved.

"Done this 28th day of February, 1939."

[1-3] In support of the demurrer to the petition for the writ of certiorari, respondent superior court first contends that the order sought to be annulled is an appealable order under section 963, subdivision 2, of the Code of Civil Procedure, and therefore not subject to review by certiorari. In this respondent court is in error. The order before us is not a special order made after final judgment within the meaning of subdivision 2 of the cited section. As was said in Griess v. State Investment, etc., Co., 93 Cal. 411, 413, 28 P. 1041, "It in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation, nor did it concern any pending motion in the case itself." It was only the determination of the trial court that the reporter was not oblig-

ed to prepare a transcript on appeal in conformity with his agreement with appellant and could refuse to do his bounden duty until appellant made financial arrangements with the reporter in accordance with the terms laid down in the challenged order of the superior court. No appeal from the order of February 28, 1939, being provided for by statute, the question of the jurisdiction of the court to make such an order is reviewable in the present proceeding. Tinn v. U. S. District Attorney, 148 Cal. 773, 84 P. 152, 113 Am.St.Rep. 354; 4 Cal. Jur. 1034; 11A Cal.Jur. 217. And even though a right of appeal from the questioned order existed, it is now settled law that an appellate court, in the exercise of its discretion, may, and occasionally does, permit the validity of a trial court's order to be tested by extraordinary writ, such as where the circumstances are aggravated and justify immediate relief. When such conditions exist and where there would be consequential damages resulting from delay, the courts have allowed the writ. Golden State Glass Corp. v. Superior Court, Cal.Sup., 90 P.2d 75. Furthermore, the entire record of the proceedings being before us, it is proper for us to review all the facts shown and render such relief as may be proper in the premises. A. G. Col Co. v. Superior Court, 196 Cal. 604, 622, 238 P. 926.

[4] Finally, it is urged by respondent court that the demurrer should be sustained for the reason that the superior court had jurisdiction of the parties and the subject-matter, thereby possessing authority to decide incorrectly as well as correctly. If the order here sought to be annulled were appealable, there might be some force to respondent's claim, but where the order complained of is nonappealable, the question of whether the court acted in excess of its jurisdiction in making the same may be properly reviewed on certiorari.

[5] In the case at bar it is conceded that petitioner in proper form appealed from a judgment rendered against her in the superior court. Upon receiving notice of such appeal, it became the duty of the court, under section 953a of the Code of Civil Procedure, to "require a stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial and also all proceedings taken on motion for a new trial and all matters to which the same relate". Section 953b of the Code of Civil Procedure makes provision for the filing of an undertaking to secure the payment of the cost of preparing such transcript, or as provided in the same section, the appellant or person intending to appeal "may arrange personally with the stenographic reporter for his compensation". It is not denied that petitioner here did make personal arrangements in writing with the reporter for the payment of the latter's fees. When this was done there was imposed upon the reporter by law the duty to make and file the transcription. Indeed, section 1085 of the Code of Civil Procedure entitles an appealing party to a writ of mandate to compel the performance by the reporter of this act which the law specially enjoins upon him as a duty resulting from the office he occupies as an official reporter of the superior court. The law desires and urges a speedy determination of appeals, and certainly it was never contemplated that after a litigant in conformity with the statute, makes a personal arrangement with the reporter for a transcript on appeal, the trial court upon application of the reporter can set aside such personal arrangements and relieve the reporter from performing his duty until the appellant shall make other arrangements with the reporter satisfactory to the latter and to the trial court. If the contract between petitioner and the reporter was unfair, against public policy or illegal, the reporter could resort to appropriate proceedings in a proper action before a court of competent jurisdiction to modify, reform, or terminate such contract, or to obtain any other claimed relief. Whatever disputes or differences may have arisen between the reporter and petitioner as appellant in the court below did not authorize the latter to make an order such as the one before us, thereby forcing the appeal to await the settlement or final determination of the private controversy between the stenographic reporter and the appellant who appears as petitioner here. Gjurich v. Fieg, 160 Cal. 331, 116 P. 745; Harris v. Burt, 47 Cal.App. 480, 190 P. 1058. When petitioner, as appellant in the trial court, complied with the provisions of section 953b of the Code of Civil Procedure providing for the reporter's compensation, the duty then devolved upon him to prepare and file the transcript, and it was incumbent upon the trial court, pursuant to section 953a of the Code of Civil Procedure, to require the reporter to perform such duty and not to excuse him therefrom.

[6] In whatever light the record is viewed, it is clear that the court never possessed jurisdiction to make the order under review, and it follows that the same should be annulled. It is therefore ordered that the demurrer to the petition be overruled and that the order of the superior court hereinabove referred to, made under date of February 28, 1939, be and the same is hereby annulled.

We concur: YORK, P. J.; DORAN, J.

---

33 Cal.App.2d 100

### PEOPLE v. FIEGELMAN et al.

Cr. 522.

District Court of Appeal, Fourth District, California.

May 27, 1939.

Rehearing Denied June 5, 1939.

Hearing Denied June 26, 1939.

**1. Larceny 🔑23**

The felonious taking of property from the person of another constitutes "grand theft," and the taking of any specified amount from the person or taking the property from any specified place on the person is not essential. Pen.Code, § 487.

[Ed. Note.—For other definitions of "Grand Theft," see Words & Phrases.]

**2. Larceny 🔑28(1)**

Information charging attempted grand theft from the person of another was sufficient, as against contention that evidence showed only an ineffectual effort to pick or take property from an empty pocket and that information charged no such offense. Pen. Code, § 487.

**3. Criminal law 🔑44**

A mere intention to commit a specified crime does not amount to an "attempt," nor is mere preparation alone sufficient, but there must be something more than mere menaces, preparation, or planning.

[Ed. Note.—For other definitions of "Attempt," see Words & Phrases.]

**4. Criminal law 🔑44**

The overt act necessary to constitute an "attempt" need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

**5. Criminal law 🔑44**

Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an "attempt."

**6. Criminal law 🔑44**

The courts should not destroy the practical and common-sense administration of the law relating to attempts with subtleties regarding what constitutes preparation and what constitutes an act done toward the commission of a crime.

**7. Criminal law 🔑44**

In determining what constitutes an attempt to commit a crime, general principles must be applied in each case as nearly as can be with a view to working out substantial justice.

**8. Criminal law 🔑44**

The condition of defendants' minds and their conduct in the attempted consummation of their design determines whether there was an actual "attempt" to commit a crime.

**9. Larceny 🔑24**

In prosecution for attempted grand theft from the person of another, evidence showing that a defendant had his right hand in victim's left hip pocket which was empty was not insufficient to sustain conviction merely because victim's money was in his front pocket. Pen.Code, § 487.

**10. Larceny 🔑70(2)**

In prosecution for attempted grand theft from the person of another, instruction defining elements of an attempt to commit a crime properly stated the law. Pen.Code, § 487.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Joseph Fiegelman and Earl Moser were convicted of attempted grand theft, and they appeal.

Affirmed.

John S. Cooper, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

In separate informations filed by the district attorney of Kern county, the defendants and appellants were charged with attempted grand theft from the person of one A. F. Hitchcock. Appellant Fiegelman, in addition to the offense described, was also accused of and admitted two prior convictions of felonies. He served two separate terms thereunder in the state prison at San Quentin. After pleas of not guilty to the charge were regularly entered the cases were consolidated for trial before a jury which returned verdicts of guilty. This appeal is prosecuted from the judgments of conviction and from orders denying their motions for a new trial.

This appeal concerns the sufficiency of the evidence, the sufficiency of the informations, and the propriety of the charge to the jury. The appellants were charged with attempted grand theft substantially as follows: That on October 1, 1938, they "did wilfully, unlawfully and feloniously attempt to take from the person of one A. F. Hitchcock, a purse containing approximately Six Dollars ($6.00) in money, lawful money of the United States of America, and of the personal property of one A. F. Hitchcock; * * *."

On October 1, 1938, there was an annual Frontier Day Parade and rodeo in the city of Bakersfield. Two police officers were assigned to protect the Frontier Day crowd against pickpockets. Two officers in plain clothes arrived at the corner of Nineteenth and Chester streets in downtown Bakersfield, at about 10 o'clock a. m. The appellants Moser and Fiegelman were standing on the corner of Nineteenth street and Chester avenue. Moser "was looking in almost every direction except the one from which the parade was coming." There was quite a crowd of people on the corner. One of the officers testified that he watched the appellants for about five minutes after he first noticed them. During this time Moser nodded to Fiegelman several times and once Fiegelman and Moser approached each other in the crowd and exchanged a few words, and then separated and went back to their previous positions. Moser at that time was wearing either a blue or a gray suit and a gray hat, and Fiegelman wore a blue serge suit. Fiegelman was carrying his coat over his left arm, although he changed arms occasionally. At that time an old gentleman, A. F. Hitchcock, came walking west on Nineteenth street, making his way to the east curb line of Chester avenue. The appellants exchanged nods, and Moser slipped through the crowd and reached the curb line ahead of Hitchcock, who was proceeding through the crowd. Fiegelman moved up behind Hitchcock. Moser changed from one foot to the other and "sort of shifted and hesitated and backed and filled". The officers approached the appellants and Hitchcock. Appellant Fiegelman had his right hand in Hitchcock's left hip pocket. The coat was hanging over his left arm, and the fingers of his left hand were holding the pocket slightly open. At that time the officer showed Fiegelman his badge and placed him under arrest.

The scene was reenacted in the courtroom before the jury with the aid of the bailiff and others. It appears from the record that the finger-tips of the left hand were in the pocket, and three fingers of the right hand extended about three or four inches into the pocket. The fingers of the right hand were wiggling. On the way to the police station the officer asked the appellant Fiegelman about the appellant Moser, and Fiegelman replied that Moser was not with him, that he was a stranger to him, and he did not know why he (Moser) was being arrested.

The other officer testified substantially the same, although he placed the time as being fifteen minutes during which they had watched the appellants.

Hitchcock testified that he was at the corner of Nineteenth and Chester streets between 10 and 11 o'clock a. m. of that day, and that at the time appellants were arrested he was informed by police officers that someone had attempted to pick his pocket. He was then carrying five or six dollars in his purse in his left front pocket. On cross-examination he testified that he did not know whether anybody was in front of him or not; that he was working his way through the crowd which was awfully thick; and that he had to keep looking down to keep from running into someone; that he could not see very well, and had to keep his head down to keep from stepping on someone; that he did not feel anyone putting his fingers in his pocket; that his sense of touch was all right but he was pretty hard of hearing.

Appellant Moser testified that on October 1, 1938, he had no occupation; that he was acquainted with appellant Fiegelman and had known Fiegelman's father since

1923; that appellants left Los Angeles for Bakersfield on September 30th; that Moser was going to Montana to take care of a civil law suit; that appellant Fiegelman was bound for San Francisco where he had a job arranged at a cleaning establishment; that they left Los Angeles about 7 o'clock in the evening and arrived in Bakersfield about 10 o'clock that night; that they then had a bite to eat and registered at a hotel and retired about 11 o'clock p. m.; that Moser registered at the hotel while Fiegelman was putting his car away; that they left the room at about 9 o'clock a. m. October 1st; that they first went to a restaurant and had breakfast and noticed as they were leaving the restaurant that it was about 10 minutes to 10 o'clock. Moser testified that he then wanted to go to the bank and inquired as to the whereabouts of the bank because he wanted to change some small bills into larger ones so he could put them in his purse and it would not be so bulky. He stated that he thought he had about $140 at the time. He testified further that he inquired about the bank and was told that it was across the street in the next block; that he arrived at the corner of Nineteenth and Chester streets, where there was a large crowd of people; that he asked someone why there was such a crowd and was informed that there was going to be a parade at 10 o'clock; that they then stood around the corner a few minutes waiting until 10 o'clock. He acknowledged that the two of them were separated a little and that the crowd was pushing around, and apparently the crowd didn't know whether the parade was coming up one street or another and that he was standing there when he was arrested.

On cross-examination he testified that he had known the appellant Fiegelman casually for several years. It also appears that at the time of Moser's arrest he had a memorandum on his person which contained a list of parades and other festivals which were to be held in California.

The appellant Fiegelman testified that prior to October 1st, he had been living in Los Angeles, where he was employed as a tailor in a cleaning and dyeing establishment. His testimony is practically the same as Moser's testimony.

[1, 2] Appellants contend that the evidence was insufficient to sustain or justify the verdict and judgment and that there was and is a fatal variance between the information, proof, verdict and judgment, and claim that the proof shows, in viewing the evidence most favorable to the prosecution, only an ineffectual effort to pick or take property from an empty pocket on the person of one Hitchcock, and that the information charges no such offense. It is argued that by reason of the fact that the evidence established that there was no money in the particular pocket at the time, it would be an absurdity to hold that a person could attempt to steal that which is not there to be stolen, citing State v. Mitchell, 170 Mo. 633, 71 S.W. 175, 94 Am.St.Rep. 763; People v. Murray, 14 Cal. 159; People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913. It is further argued that where the allegation is made in the information that the attempt was to steal certain property, the proof must follow the information and such an attempt must be shown. It is the felonious taking of property "from the person of another" that constitutes grand theft, and not the taking of any specified amount from the person nor taking the property from any specified place on the person. Sec. 487, Pen.Code. The information sufficiently alleges this fact.

[3] The case of People v. Miller, supra, cited by appellants, sets forth the elements of attempt, i. e., (1) a specific intent to commit the crime and (2) a direct ineffectual act done towards its commission. It is there stated also that a mere intention to commit a specified crime does not amount to an attempt, nor is mere preparation alone sufficient, but there must be something more than mere menaces, preparation or planning.

[4-7] The overt act need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime. It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case. General principles must be applied

in each case as nearly as can be, with a view to working out substantial justice. The question of what overt act is sufficient to constitute an attempt to commiit a crime has been the subject of much discussion by both text writers and courts, and there is some conflict in the decisions. In the early English cases the view seems to have been adopted that to constitute an attempt the overt act must be the final one towards the completion of the offense, and of such a character that unless it had been interrupted, the offense itself would have been committed. This extreme doctrine has not been accepted in this country and certainly not in this state. But assuming that mere preparation is not in all cases an attempt to commit the crime, it is well settled in this country that it is not necessary to constitute an attempt that the act done should be the last proximate one for the completion of the offense.

[8] It is the condition of appellants' minds and their conduct in the attempted consummation of their design which determines whether there was an actual attempt to commit the crime. Here appellants did their utmost to effect the consummation of the crime intended by them. They failed only by reason of a cause or causes not previously apparent to them.

"It is a well-settled principle of criminal law in this country," says our Supreme Court in People v. Lee Kong, 95 Cal. 666, at page 668, 30 P. 800, at page 801, 17 L.R. A. 626, 29 Am.St.Rep. 165, "that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket, or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny."

[9] We cannot conclude that the evidence is insufficient because the victim's money was in his front pocket. We are thoroughly convinced that appellants' argument must be rejected as untenable and that the evidence in the instant case establishes the inescapable corollary and the conclusion is irresistible that the attempt to commit the offense has been sufficiently charged and that the offense as pleaded has been sufficiently established and comes well within the rules laid down in the cited cases. See, also, 14 Amer.Jur. 817; In re Magidson, 32 Cal.App. 566, 163 P. 689; Note People v. Lee Kong, 95 Cal. 666, 30 P. 800, 17 L.R.A. 626, 29 Am.St.Rep. 165; 17 Cal.Jur. 879; People v. Miller, supra; People v. Cloud, 100 Cal.App. 792, 281 P. 79.

[10] Complaint is also made that the court erred as a matter of law in instructing and failing to instruct the jury. The instruction given on the question of attempt was as follows:

"An attempt to commit a crime consists of two elements; namely, the intent to commit it, and the direct, ineffectual act done towards its commission. In other words, there must be a unity of intent and overt act. 16 C.J. 113, sec. 92; 8 R.C.L. 277, sec. 294.

"There is a difference between the preparation antecedent to the offense and the actual attempt to commit it. The attempt is a direct movement toward the commission after preparations are made and must be manifested by acts which would have ended in the crime if not interrupted. Whenever the design of a person or persons to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt. [Stokes v. State, 92 Miss. 415, 46 So. 627] 21 L.R.A.,N.S., 898.

"It is immaterial whether or not the crime attempted was impossible of completion if you find that it was apparently possible of completion to the person or persons so acting with the necessary intent."

Appellants' objection is directed to the fact that this was the only instruction given which had reference to the law of attempt, citing People v. Miller, supra, in support of their contention that the given instruction was not sufficient. The instruction given in the Miller case, which was held insufficient, lacks many of the qualities of the instruction given in the instant case. This instruction sufficiently defines the elements of an attempt to commit a crime. We have examined all instructions given and refused and reach the conclusion that the jury were properly instructed as to the law and that the evidence is sufficient to uphold the findings and verdicts of the jury.

The judgments and orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

33 Cal.App.2d 169

### LANE et al. v. SAFEWAY STORES, Inc., et al.

Civ. 11779.

District Court of Appeal, Second District, Division 1, California.

June 2, 1939.

**1. Master and servant 🔑302(6)**

Where an employee acts without any reference to the service for which he is employed, and not for the purpose of performing his employer's work, but to effect some independent purpose of his own, the employer is not responsible for the employee's act or omission.

**2. Master and servant 🔑302(6)**

Though employer's responsibility for servant's acts is not limited exclusively to acts which promote the objects of the employment, it is essential in order to fix responsibility on employer that employee, at time of doing the wrongful act, was acting in behalf of employer and not on his own account.

**3. Master and servant 🔑302(3)**

Where store employee kicked child who had been consummating purchase, in rough play rather than because of any controversy concerning the purchase, master-servant relation did not exist as respects such conduct, and employer was not liable for resulting injuries. Civ.Code, § 2338.

**4. Master and servant 🔑302(1)**

The rule making master liable for servant's act or omission implies that master will not be liable for wrongs committed by the servant while not acting within the scope of his authority. Civ.Code, § 2338.

**5. Appeal and error 🔑1010(1)**

An appellate tribunal may not invade the field of the trier of facts unless the evidence relied upon by the trial court may justly be held insufficient to support the ultimate issue involved, in which event there is not a review of a question of fact, but purely one of law.

**6. Appeal and error 🔑1010(1)**

Where it cannot be said that testimony contradicting plaintiff's testimony is improbable upon its face or is not true, the reviewing court cannot impinge upon trial court's prerogatives to base judgment upon such evidence.

**7. Parent and child 🔑7(1)**

A child's father, who is primarily liable for medical expenses incurred because of injury to child, may sue for assault committed on child, to recover such expenses.

**8. Trial 🔑397(1)**

In action by child for assault, and by father for medical expenses incurred as result of assault, wherein there was uncontradicted testimony showing rendition of medical services, trial court was required to make finding upon the existence and value of such services for which father would be liable, and to give father judgment therefor.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Jack Lane, a minor, by his guardian ad litem, Claude Lane, and Claude Lane, against the Safeway Stores, Incorporated and another, for personal injuries resulting from assault made by named defendant's employee. From a judgment for defendants, plaintiffs appeal.

Affirmed in part, and reversed and remanded with directions in part.

Dempster & Dempster and J. H. Creighton, of Los Angeles, for appellants.

George L. Greer, of Los Angeles, for respondents.

WHITE, Justice.

This is an action to recover damages for personal injuries alleged to have been sustained by the minor plaintiff by reason of an alleged wilful assault made upon him by defendant Dick Losee, an employee of defendant The Safeway Stores, Inc. The amended complaint alleges that the minor plaintiff, Jack Lane, aged nine years, was sent by his mother to a store maintained by defendant corporation in the city of Los Angeles, for the purpose of purchasing, and that the boy did purchase, a washboard from The Safeway Stores, Inc., the sale being made by defendant Dick Losee, acting in his capacity as a clerk and employee in the store of his codefendant. It is further alleged that while the minor plaintiff was in the store consummating the purchase in question, defendant Dick Losee, without any cause or provocation, and while acting in the course and scope of his employment, kicked the minor plaintiff, Jack Lane, upon the hip, causing the boy to fall upon a concrete floor, thereby sustaining injuries to his nose, forehead and hip; for all of which damages were prayed for in the sum of thirty thousand dollars and such sum as might be proven at the trial to have been necessarily expended for medical care and attention in an effort to cure the minor plaintiff of his injuries. The answer of defendant The Safeway Stores, Inc., contained a sufficient denial that defendant Losee was at any time mentioned in the amended complaint acting within the course and scope of his employment by such answering defendant, while the answer of defendant Dick Losee denied kicking the minor plaintiff without cause or provocation or with any "great force or violence", and averred that whatever injuries were sustained by the minor plaintiff were occasioned when the latter, "as such customer indulged in rough play" with the answering defendant Losee.

Trial was by the court sitting without a jury, at the conclusion of which the court made two sets of findings and conclusions of law, and entered two judgments. In one set of findings the court found that defendant Dick Losee was not acting in the course and scope of his employment at the time he kicked the minor plaintiff, and ordered judgment thereon in favor of the defendant The Safeway Stores, Inc. By the other set of findings the court determined that defendant Dick Losee did kick the minor plaintiff, but that the former was not acting in the course and scope of his employment by his codefendant. Based on the last-named findings, judgment was entered in favor of the minor plaintiff and against defendant Dick Losee in the sum of fifty dollars. No findings were made with reference to the second cause of action predicated upon the obligation of plaintiff Claude Lane as father of the minor plaintiff, Jack Lane, for medical expenditures in connection with the treatment of said minor plaintiff for his injuries.

The first contention made by appellant is that the court erred in finding that the defendant Dick Losee was not acting in the course and scope of his authority as an employee of defendant corporation at the time he assaulted plaintiff Jack Lane. It is established without conflict in the evidence that there was no argument or dispute between the minor plaintiff and defendant Losee; while the court adopted respondent Losee's version of what took place on the occasion of the alleged wrongful act, epitomizing the incident in the following language when making a summation of the evidence at the close of the trial: "In this particular case I think the boy was fooling around this store, doing like many a boy will do. I think he was mischievous. * * * A man of the size of Mr. Losee, I think he was kicking at him playfully there, and probably kicked harder than he intended." When testifying as a witness at the trial, defendant employee testified: "Well, he" (the minor plaintiff, Jack Lane) "first came in happy, talking with us, talking back and forth with me and with anybody else in the store. We were all talking with him, kidding with him. He went back and got his washboard. At that time I lightly kicked him."

[1] Therefore the question presented to us is whether a clerk who while making a sale to a nine-year-old customer engages in playful repartee with the latter and finally in connection therewith kicks the minor customer, thereby commits a wrongful act while in the service of his employer and within the scope of his employment—that is, in the transaction of the master's business. It is firmly established as the law that where an employee acts without any reference to the service for which he is employed and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the employer is not responsible in that case for either the act or omission of the employee. Mott v. Consumer's Ice Co., 73 N.Y. 543. The test of the master's responsibility for the act of the servant was described in Cosgrove v. Ogden, 49 N.Y. 255, 257, 10 Am.Rep. 361, as "not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do." In Howe v. Newmarch, 12 Allen 49, 94 Mass. 49, 57, it was said: "And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of per-

forming what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

[2, 3] While it is true that responsibility of the employer is not limited exclusively to those acts which promote the objects of the employment, nevertheless, it is essential in order to fix responsibility on the employer that the employee, at the time of doing the wrongful act, must be acting in behalf of the employer and not on his own account. For instance, in the case at bar, if during the negotiations between the employee and the customer in connection with the sale a controversy or dispute had arisen, and the employee wrongfully assaulted the customer, the employer would be liable, because, although the latter did not expressly authorize the employee to commit the tort, it was nevertheless committed in the course of the transaction of the employer's business. In the case at bar the work which the employee was to perform for defendant corporation was to sell the latter's merchandise, and where, not in connection with the service for which he was employed, but to accomplish an independent purpose of his own, he engaged in play with the customer, the relation of master and servant as to that particular conduct did not exist, and the defendant employer cannot be held liable for any damage resulting therefrom. As was said in Stephenson v. Southern Pacific Co., 93 Cal. 558, at page 563, 29 P. 234, at page 235, 15 L.R.A. 475, 27 Am.St.Rep. 223: "It would not be contended that one who employs another to sprinkle his garden, and places in his hands a hose to be used for that purpose, would be civilly responsible in damages if, stepping aside from that employment, the servant should, either in sport or from malice, turn the same upon a person quietly passing along the street. In the commission of such an assault the servant would not be acting within the scope of his employment, nor would the hose be used in the transaction of the business of his employer. * * *"

[4] Section 2338 of the Civil Code, so far as applicable here, reads as follows: "a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business * * *." Manifestly, when the defendant employee departed from the course of his duties to engage in a reciprocal act of "kidding" with the customer, his conduct was not a part of or in connection with the transaction of his employer's business. While it is true the defendant employee was on duty for the employer, nevertheless the act complained of was the result of a departure from the employer's business and not in the line of the employee's duty. Hiroshima v. Pacific Gas & Elec. Co., 18 Cal.App.2d 24, 63 P. 2d 340. As pointed out in Stephenson v. Southern Pacific Co., supra: "The rule of law which makes the master liable to respond in damages for the act or omission of the 'servant implies that the master will not, in any case, be liable for wrongs committed by the servant while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life men are constantly obliged to act by others; but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment.'" The finding of the trial court that the defendant employee, Dick Losee, was not acting within the course and scope of his employment by his codefendant at the time he kicked the minor plaintiff was therefore correct, and the judgment based thereon in favor of defendant The Safeway Stores, Inc., must be upheld.

[5, 6] It is next contended by appellants that the judgment in favor of the minor plaintiff against defendant Dick Losee for fifty dollars is totally inadequate as compensation for the injuries received by such minor plaintiff. It is true, as urged by appellants, that there is in the record ample evidence, if believed by the trial court, to support a much more substantial sum than was awarded, but there was also evidence in conflict therewith which would warrant the trial court in concluding that the injury to the minor plaintiff proximately caused by the assault was not severe and merited but nominal damages. While the trial court had the right to disbelieve, as he did, the testimony of certain witnesses and to conclude that the minor plaintiff was, as the trial court put it, "talked to and told what to testify to", yet no rule

is more firmly grounded in the law than that which precludes an appellate tribunal from invading the field of the trier of facts unless the evidence relied upon by the trial court may justly be held to be insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Where, as here, it cannot be said that the testimony in contradiction of that offered by plaintiffs is improbable upon its face or is not true, this court cannot impinge upon the prerogatives of the trial court to base a judgment upon such evidence. Testimony, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se must involve a claim that the things testified to would not seem possible. Upon the record before us, we cannot so conclude.

[7, 8] However, the judgment in favor of the minor plaintiff, Jack Lane, and against defendant Dick Losee must be reversed, for the reason that the amended complaint contained two causes of action, in the second of which the minor plaintiff's father, Claude Lane, also a party plaintiff, sought for himself to recover the amount of money expended by him or for which he became obligated for medical care in the treatment of his minor son in an effort to cure his son of the injuries allegedly sustained by the latter; and while there was evidence offered upon this issue, the court made no findings thereon. The father, being primarily liable for such medical expenses, was entitled to sue as he did in the instant case for their recovery (McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 223, 255 P. 755); and it was incumbent upon the trial court to make a finding upon such issue raised in the allegations of the second cause of action and presented to the court for determination by the evidence. In our perusal of the record, we find therein uncontradicted testimony by a physician that shortly after the accident he treated the minor plaintiff, and thereafter saw him professionally some thirty-three to thirty-five times, for which services, he testified, a fee in the sum of $150 was reasonable. It therefore became necessary for the court to make a finding as to whether or not such medical services were rendered by reason of the injuries sustained as a result of the assault which the court concluded was made upon the minor plaintiff by defendant Dick Losee, and also to make a finding as to the reasonable value of such services, and to give judgment in favor of plaintiff Claude Lane for such amount as the court found to be reasonable and for which said plaintiff Claude Lane would be liable.

The judgment in favor of defendant The Safeway Stores, Inc., and against the plaintiffs is affirmed.

The judgment in favor of the plaintiff Jack Lane and against defendant Dick Losee for the sum of fifty dollars is reversed, and the cause remanded with directions to the court below to make findings upon the issues presented by the allegations of the second cause of action whereby plaintiff Claude Lane seeks to recover the amount of expenses incurred by him for medical treatment of his minor son, plaintiff Jack Lane, and thereafter to reenter judgment in the same amount as heretofore for the minor plaintiff and to enter a judgment on the second cause of action of the amended complaint in accordance with the facts found.

We concur: YORK, P. J.; DORAN, J.

---

33 Cal.App.2d 80

## PEOPLE v. GOODALE.

Cr. 442.

District Court of Appeal, Fourth District, California.

May 25, 1939.

**1. Criminal law ⇨741(1), 742(1)**

The questions of weight and sufficiency of evidence and witnesses' credibility are first addressed to jury.

**2. Criminal law ⇨1159(3)**

A jury's implied finding, supported by abundant evidence, on fact question, is final and cannot be disturbed by appellate court because of conflicts in evidence.

**3. Automobiles ⇨344**

To support conviction of automobile driver for negligent homicide, there must be causal connection between defendant's intoxication or negligence and fatal accident. St. 1935, p. 173, § 500.

**4. Automobiles ⚷355(13)**

Evidence *held* sufficient to support conviction of automobile driver for negligent homicide. St.1935, p. 173, § 500.

**5. Witnesses ⚷316**

A mistake in witness' description of accident as to one particular does not prevent jury from accepting balance of his evidence as true, if not inherently improbable.

**6. Criminal law ⚷855(8)**

A juror's remarks to woman, in courthouse hall during recess before completion of testimony for defendant, that latter's attorney was groping in dark and trying to manufacture evidence and did not have a leg to stand on so far as evidence was concerned, were highly improper.

**7. Criminal law ⚷928, 1174(5)**

A juror's improper remarks, to woman in courthouse hall during recess before completion of testimony for defendant, that latter's attorney was groping in dark and trying to manufacture evidence and did not have a leg to stand on so far as evidence was concerned, did not justify reversal of judgment on verdict of conviction and order denying defendant's motion for new trial, in absence of showing of sufficient injury to defendant from such remarks to justify appellate court in ordering new trial.

**8. Criminal law ⚷959**

The trial judge should have made prompt investigation into truth of charge in affidavit supporting defendant's motion for new trial after conviction of negligent homicide that district attorney prevented defendant from securing testimony of defendant's companion at time of fatal accident by causing filing of complaint charging latter with manslaughter, instead of stating merely that affidavit "may be deemed denied." St.1935, p. 173, § 500.

**9. Criminal law ⚷913(3)**

Defendant must use due diligence to produce her evidence at trial.

**10. Criminal law ⚷913(3)**

A statement to defendant's attorney by attorney for defendant's companion at time of alleged negligent homicide, that latter would not testify while manslaughter charge was pending against him, was not sufficient excuse for defendant's failure to procure issuance and service of subpœna for such witness before trial, which commenced 27 days after dismissal of such charge. St.1935, p. 173, § 500.

**11. Criminal law ⚷939(4)**

Defendant, discovering on first day of trial for negligent homicide that her companion at time of fatal accident might be available as witness for her because of previous dismissal of manslaughter charge against him, but failing to call trial judge's attention to such fact or such witness' absence and request continuance during trial, did not exercise due diligence to obtain his presence, as required to entitle her to new trial on ground of newly discovered evidence. St.1935, p. 173, § 500.

**12. Criminal law ⚷938(4)**

A physician's affidavit, that defendant's temperament was such that shock of finding boy unconscious in street after automobile driven by defendant struck him would have produced all symptoms of intoxication except alcoholic breath, was insufficient to warrant new trial on ground of newly discovered evidence after conviction of negligent homicide, in view of affiant's similar testimony at trial. St.1935, p. 173, § 500.

**13. Criminal law ⚷941(1)**

An appellate court cannot grant new trial after conviction of crime to allow defendant to introduce cumulative evidence.

**14. Criminal law ⚷829(1)**

Refusal of defendant's requested instructions on subject matter covered generally in other instructions given jury was not error.

**15. Automobiles ⚷357**

In trial of automobile driver for negligent homicide, instructions permitting conviction on proof beyond reasonable doubt that defendant committed any of several acts made punishable by statute were proper, where information charged commission of such acts. St.1935, p. 173, § 500.

◆

Appeal from Superior Court, San Diego County Gordon Thompson, Judge.

Mrs. Orpha B. Goodale was convicted of negligent homicide, and she appeals.

Affirmed.

Thomas Whelan and Richard L. Vaughn, both of San Diego, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was convicted of the crime of negligent homicide. She has appealed from the judgment and from the order denying her motion for new trial.

The record presents a somewhat unusual situation. Defendant applied for probation. At the conclusion of the hearing of her petition the trial judge, in a formal written order, first definitely suspended the imposition of sentence on defendant for two years during which time he placed her on probation. Immediately following the terms of probation the court sentenced defendant to confinement in the California Institution for Women at Tehachapi for the term prescribed by law, commitment to be withheld for two years, during which time defendant was required to conform to additional conditions of probation. As no question is raised on the seemingly contradictory terms of the orders we will not inquire into their regularity. All questions argued may be considered on the appeal from the order denying the motion for new trial.

Defendant presents the following grounds for reversal of the judgment and order denying her motion for new trial: Insufficiency of the evidence to support the verdict; misconduct of a juror; misconduct of the district attorney; newly discovered evidence; error in instructions given and in refusing to give instructions requested by defendant.

The evidence shows that on November 27, 1938, defendant, in company with Thomas Jordan, a friend of defendant's family, drove his automobile for him from Escondido to San Diego. They transacted some business, had lunch, consumed about three or four drinks each of intoxicating liquor and commenced the return trip to Escondido shortly after three o'clock in the afternoon, with defendant driving the car. They were leaving San Diego over Sixth avenue which runs north and south. Two boys, Richard Parker and Dick Noel, were riding their bicycles north on Sixth avenue at the same time. Richard was riding directly ahead of Noel and about six feet west of the east curb of Sixth avenue. Defendant, driving north at a lawful speed, overtook the two boys at the junction of Sixth and Hawthorne avenues. In an attempt to pass the boys on the bicycles, the right front of the automobile defendant was driving came into contact with Richard's bicycle. He was thrown to the pavement and his neck was broken. He died shortly afterwards.

[1, 2] Defendant first argues that there is no sufficient evidence of her intoxication. While the evidence on this question is sharply conflicting there is ample evidence in the record supporting the implied finding of the jury that she was under the influence of intoxicating liquor at the time and place of the accident. The question of the weight and sufficiency of the evidence and the credibility of the witnesses is first addressed to the jury. Where, as here, there is abundant evidence supporting the implied finding of the jury on that question the decision of that body is final and cannot be disturbed here because of conflicts in the evidence.

Defendant next urges that, assuming her intoxication for the purpose of argument only, there is insufficient evidence to support the verdict of negligence on her part or that such negligence or intoxication was a proximate cause of the collision.

It is defendant's contention that the two boys were riding their bicycles north near the east curb line of Sixth avenue; that she was driving the automobile in the same direction in a lawful manner; that there was ample space between the automobile and Richard's bicycle to permit her to pass it safely had it continued on its course; that suddenly and without any warning Richard swerved his bicycle to the left and into the front of the automobile; that upon seeing this maneuver she turned the automobile sharply to her left but could not avoid the collision.

[3] Had the jury accepted this evidence as true its verdict would have been in favor of defendant for there must be a causal connection between defendant's intoxication or negligence and the accident in order to support a verdict finding her guilty of negligent homicide. See People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978.

[4] Howard C. Gearnflow, a disinterested witness, testified that when defendant was passing the bicycles she swerved the automobile to her right and onto Richard and his bicycle. Long scratches on the pavement, probably made by a pedal of the bicycle while it was being carried by the automobile, support the testimony of this witness. The jury accepted this evidence as true. It is sufficient to support the verdict.

[5] Defendant bitterly attacks the testimony of Gearnflow and points to inconsistencies in it. She also attacks the evidence concerning the scratches on the pavement. These arguments should have been, and probably were, addressed to the jury. In one particular this witness was undoubtedly mistaken in the position in which he placed the bicycles on the street at the time of the accident. The balance of his evidence is not inherently improbable and as the jury accepted it as true the conclusion of that body cannot be disturbed here. Because a witness is mistaken in one particular in his description of an accident does not prevent a jury from accepting his other evidence as true where it is not inherently improbable.

[6, 7] The charge of misconduct on the part of the jury is based on an affidavit of John Morris, in which the following appears: "That on Tuesday, January 24, 1939, he was present during a portion of the trial of the case of The People of the State of California v. Orpha B. Goodale; that during a recess of the court and before testimony being introduced on behalf of the defendant had been completed he heard a statement made by one of the jurors sitting in the trial of said case to a woman in the hall of the court house; that said juror made a statement substantially as follows: 'The attorney for the defendant is groping in the dark and trying to manufacture evidence and doesn't have a leg to stand on as far as the evidence is concerned.'"

The affidavit proceeds to identify this juror on information and belief as one Hildreth Peckham, and states that counsel for defendant were informed of the statement so made after the conclusion of the trial.

Two other affidavits were filed at the same time by permission of the trial judge, who at that time said: "On the understanding—* * * they may be deemed denied, they may be filed."

If the statements in the Morris affidavits be deemed denied, there is presented the familiar situation of a conflict in the evidence that was resolved against defendant by the trial judge.

That the remarks of the juror were highly improper cannot be denied. In commenting on misconduct of jurors in People v. Yee King, 24 Cal.App. 509, 141 P. 1047, 1049, the court said: "This being so, it cannot be fairly said that the showing made in support of the motion for a new trial would have warranted the court below in finding that the visit of the two jurors to the scene of the homicide resulted in substantial injury to the defendant. That such visit was an irregularity amounting to serious misconduct must be conceded; but such misconduct is not per se sufficient to warrant the granting of a new trial. Prejudice must be shown to have followed; and, in the absence of an affirmative showing of resultant injury to the defendant in the present case, the verdict must stand. People v. Hope, 62 Cal. 291; People v. White, 20 Cal.App. 156, 128 P. 417; People v. Kramer, 117 Cal. 647, 49 P. 842; State v. Perry, 121 N.C. 533, 27 S.E. 997, 61 Am.St. Rep. 683; State v. Tilghman, 33 N.C. 513."

In the instant case there is no showing of sufficient injury to defendant from the remarks of the juror to justify us in ordering a new trial. See, People v. Tugwell, 32 Cal.App. 520, 163 P. 508; People v. Staigers, 92 Cal.App. 628, 268 P. 923. By this conclusion we do not want to be understood as condoning the action of the juror. If he made the statement credited to him he violated the admonition frequently given to the jury by the trial judge and was subject to punishment therefor. What action was taken against him is not a part of this record and cannot directly affect the results of this appeal.

[8] Defendant complains of misconduct of the district attorney. This misconduct is set forth in an affidavit of one of her counsel which was presented at the hearing of the motion for new trial. These charges were of such a serious nature that the trial judge should not have contented himself with the statement that the affidavit "may be deemed denied". A prompt investigation into the truth of the charges should have been made.

After summarizing the evidence of Mrs. Goodale as to the circumstances of the collision, the affidavit averred on information and belief that Thomas Jordan, who was in the automobile with Mrs. Goodale at the time of the accident, would corroborate defendant's testimony; that she was operating the automobile in a careful, prudent and lawful manner and that Richard Parker swerved his bicycle into the automobile so that defendant could not avoid the collision; that defendant was not under the influence of intoxicating liquor to an appreciable degree at the time of the accident; that defendant was prevented from securing the testimony of Jordan at the trial by the district attorney of San Diego county who, on or about October 29, 1938, caused to be filed against Thomas Jordan a criminal complaint charging him with the crime of manslaughter in connection with the death of Richard Parker; that no preliminary hearing was ever had on the charge; that this charge against Jordan was dismissed on December 19, 1938; "that affiant is informed and believes because of conversations with Claude L. Chambers, attorney for Thomas Jordan, and with various members of the district attorney's staff, that it was the purpose of the office of the district attorney of San Diego to hold said charge of manslaughter over Thomas Jordan so that he would not testify for Orpha B. Goodale; that after affiant had had such conversations with said persons, the said cause against Thomas Jordan was, without any notice to affiant, dismissed on December 19, 1938; that when affiant first learned that the cause against Thomas Jordan had been dismissed, which was on the day the trial of the above-entitled action was commenced, he caused a subpoena to be issued for said Thomas Jordan, but that the said Thomas Jordan concealed himself, and the deputy sheriff charged with the duty of serving said subpoena was unable to locate said Thomas Jordan during the trial of this action, although the same continued for three days; that affiant is informed and believes that said Thomas Jordan concealed himself because of the fact that he feared persecution on the part of the office of the district attorney of San Diego County"; that the reason affiant had not caused a subpoena to be issued for Thomas Jordan before January 16, 1939, was that the attorney for Jordan informed affiant that as long as the manslaughter charge was pending against him he would not be permitted to testify at the trial of defendant for the reason "that anything he might say might tend to incriminate him".

The gravamen of the foregoing charge, though somewhat vaguely stated, is that the district attorney used the power of his office through a criminal complaint to obstruct justice by depriving defendant of the testimony of a witness in her behalf. This charge is so grave that an investigation in the trial court of its factual foundation would have been highly proper. There was no such investigation and the affidavit was met with the wholly inadequate statement that its averments "may be deemed denied". Under these circumstances we are forced to the unsatisfactory position of a consideration of the technical sufficiency of the affidavit as a ground for granting the motion for new trial. From the record there would seem to be no probable cause for believing Jordan guilty of manslaughter in connection with the death of Richard Parker. He was neither driving nor controlling the automobile. The examining physician reported him only "slightly intoxicated".

[9-11] It is clear from the record that the evidence of the prospective witness Jordan was not newly discovered after the trial. Mrs. Goodale knew he was riding with her and knew what he saw at that time. She therefore knew at all times to just what facts he could truthfully testify. All that can be claimed is that the availability of this evidence was first discovered by defendant on the first day of the trial.

It is elementary that a defendant must use due diligence in an endeavor to produce her evidence at her trial. Is sufficient excuse offered by defendant for her failure to have a subpoena issued for Jordan prior to the first day of the trial? This excuse is that the attorney for Jordan informed an attorney for defendant that Jordan would not testify as long as the manslaughter charge was pending against him. This would hardly excuse the service of a subpoena on Jordan before the trial date. If he had been subpoenaed he would have been present in court at the trial, or his absence could have been made a ground for an application for a continuance had his testimony been considered necessary to defendant. The reason given by his counsel for his refusal to testify had been removed twenty-seven full days before the commencement of the trial. The inference to be drawn from the affidavit is that had he been in court during the trial his testimony would have been available to either party as the criminal charge against him had been dismissed. Assuming that the discovery of his availability as a witness on the first day of the trial would enable us to regard his evidence as newly discovered, there is no showing of due diligence on the part of defendant to obtain the presence of this witness.

As defendant discovered on the first day of the trial that Jordan might be available as a witness in her behalf, she should have called the attention of the trial judge to that fact, together with the fact of his absence, and should then have taken whatever steps she could to protect herself from any injury resulting from his absence. This she did not do. She announced that she was ready for trial and proceeded throughout the trial without making any request for a continuance to enable her to search for this witness. It was not until the hearing of the motion for new trial that the facts contained in the affidavit were laid before the trial judge. It appears that defendant was willing to proceed with the trial without the presence of Jordan and to gamble on its results without the benefit of the testimony of that witness. She did not even ask the indulgence of the trial court to assist her in securing this evidence. All of the facts set forth in the affidavit were known to her before the jury found her guilty. It was not until her gamble had gone against her that she sought relief, too late to do her any good.

[12, 13] On the motion for new trial defendant presented the affidavit of Dr. E. Hodge Crabtree as disclosing newly discovered evidence. This affidavit discloses that Dr. Crabtree was called to treat defendant immediately after the verdict finding her guilty had been returned; that he found her in a condition of collapse from what is commonly (not medically) known as mental shock produced by the verdict; that, excepting an alcoholic breath, she exhibited all of the symptoms of intoxication; that in his opinion defendant was of such a temperament that the shock of the verdict did produce, and the similar shock of finding Richard Parker unconscious in the street after the automobile she had been driving had struck him, would have produced all of the symptoms of intoxication except an alcoholic breath.

Dr. Crabtree had been a witness for defendant at the trial. He testified that after an examination of defendant he was of the opinion that the shock of finding Richard Parker unconscious in the street might have produced and probably did produce in her all of the symptoms of intoxication testified to by witnesses for the People except the alcoholic breath. To that extent the facts set forth in his affidavit were cumulative. An appellate court is not permitted to grant a new trial to allow a defendant to introduce evidence that is cumulative. People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849.

[14, 15] Defendant complains of the refusal to give instructions requested by her. The subject-matter of those instructions was covered generally in other instructions given to the jury. She also complains of instructions given by the trial court which permitted her conviction on proof beyond a reasonable doubt of her having committed any of the several acts made punishable by section 500 of the Vehicle Code. St.1935, p. 173. As the information charged the commission of such acts the instruction was proper. People v. Leyshon, 108 Cal. 440, 41 P. 480; People v. Frank, 28 Cal. 507.

The judgment and order denying the motion for new trial are and each of them is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

---

## SKALKO v. CITY OF SUNNYVALE. *

Civ. 10960.

District Court of Appeal, First District, Division 2, California.

May 25, 1939.

Hearing Granted July 24, 1939.

See 93 P.2d 93.

**1. Municipal corporations ⇨63(1, 2)**

The zoning of property is legislative question with which courts cannot interfere unless legislative determination is shown to be arbitrary, discriminatory, or unreasonable.

**2. Municipal corporations ⇨601**

That landowner can devote property zoned as "residential" to some commercial uses without affecting the health, safety, morals, or welfare of community is not the measure by which the courts can judge the validity of zoning ordinance.

**3. Municipal corporations ⇨601**

A landowner seeking to use his property for purposes other than those designated in zoning ordinance must prove invalidity of ordinance and not merely cast a doubt on it or show that some other classification might have been more reasonable or satisfactory.

---

*For subsequent opinion see 93 P.2d 93.

**4. Eminent domain 🔑2(1), 69**

If, in prosecution of governmental functions, it becomes necessary to take private property, compensation must be made, but incidental damages to property resulting from governmental activities, or laws passed in promotion of public welfare, are not "taking" of property.

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)," see Words & Phrases.]

**5. Municipal corporations 🔑625**

Zoning ordinances, or ordinances excluding any commercial use of property in certain area, must be reasonable, and use excluded must bear some reasonable relation to public interest.

**6. Municipal corporations 🔑625**

Where reasonable minds may differ as to propriety of classification in zoning ordinance, legislative determination is conclusive as to reasonableness.

**7. Municipal corporations 🔑63(1)**

The legislative body of municipality intrusted with police power has wide discretion, which cannot be interfered with by courts.

**8. Municipal corporations 🔑122(2)**

Ordinances of municipality enacted pursuant to police power are invested with strong presumption of validity.

**9. Municipal corporations 🔑122(2)**

Where question whether ordinance is unreasonable or arbitrary exercise of police power is fairly debatable, ordinance must be upheld as valid.

**10. Municipal corporations 🔑601, 625, 626**

A zoning ordinance of city with less than 4,000 people placing 40 acres in commercial zone and 726 acres in residential zone was not arbitrary, discriminatory, or unreasonable as to owner whose land in residential zone was in sparsely settled agricultural area, where area in commercial zone was sufficient to accommodate population of 26,000 people and land in residential zone could be used for all forms of agriculture except stock raising.

◆

Appeal from Superior Court, Santa Clara County; H. S. Schaffer, Judge.

Suit by Nick Skalko against the City of Sunnyvale, a municipal corporation, to have a municipal zoning ordinance adjudged void and to restrain municipal authorities from enforcing the ordinance in so far as it restricted plaintiff in his use of his property which was zoned as "residential." From the judgment, the plaintiff appeals.

Affirmed.

Joseph F. Di Maria, of San Jose, for appellant.

N. E. Wretman, of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the City of Sunnyvale to have it adjudged that the municipal zoning ordinance was void, and to restrain the municipal authorities from enforcing the ordinance in so far as it restricted plaintiff in his use of his property which was zoned as "residential".

The ordinance was enacted in 1926. It divided the city into three zones—commercial, industrial, and residential. Of a total area of over nine hundred acres approximately forty acres were placed in the commercial zone, approximately one hundred and forty acres in the industrial zone, and seven hundred and twenty-six in the residential zone. The city is primarily industrial and residential, many of the latter holdings being devoted to fruit raising and agriculture generally. By section 4 of the ordinance it was provided that the residential zone might be used for "dwellings, rooming and boarding houses, auto camps, churches, schools, club houses, recreation, private garages and other customary accessory outbuildings, green houses, nurseries, and all other forms of agriculture except stock raising, except as hereinafter provided". The area set aside for commercial purposes was shown to be sufficient to accommodate a population of twenty-six thousand, whereas the population of the city was less than four thousand at the time of trial. Upon all the evidence the trial court found that the classification of forty acres as commercial was ample and reasonable, and that the property of plaintiff was located in an agricultural area, "sparsely settled, dwellings of rather low value, and said area is properly designated and included in the residential area by said zoning ordinance".

[1-3] In the light of these facts the case presents no legal difficulties. Appellant argues that he should be permitted to use his property for commercial pur-

poses other than those which the ordinance permits in the residential zone. The respondent argues that this is a legislative question with which the courts may not interfere unless the legislative determination is shown to be arbitrary, discriminatory or unreasonable. Such is the settled rule in this state in reference to these zoning ordinances, and, it should be noted, the appellant does not attack the ordinance upon any of these grounds, but rests his case solely upon the contention that he might devote his property to some commercial uses without affecting the health, safety, morals or welfare of the community. This is not the measure by which the courts can judge the validity of such ordinances. The burden is on the appellant to prove its invalidity, not merely to cast a doubt on it or to show that some other classification might have been more reasonable or satisfactory.

[4-10] The applicable principles of law involved are found in the two following cases from which we quote. "Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made." Miller v. Board of Public Works, 195 Cal. 477, 488, 234 P. 381, 385, 38 A.L.R. 1479. "Of course, zoning ordinances, or ordinances excluding any commercial use, must be reasonable, and the use excluded must bear some reasonable relation to the public interest. But, as indicated from the above quotations, where reasonable minds may differ as to the propriety of the classification, the legislative determination is conclusive. The principle is quite clearly stated in Marblehead Land Co. v. City of Los Angeles, [9 Cir.], 47 F.2d 528, 532, as follows: 'The legislative body intrusted with the police power has a wide discretion which cannot be interfered with by the courts. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly debatable, the legislation must be upheld as valid.'" Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 94, 33 P.2d 672, 675.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

33 Cal.App.2d 186

## In re TANNER'S ESTATE.

## TANNER v. CAROTHERS.

Civ. 2273.

District Court of Appeal, Fourth District, California.

June 2, 1939.

**1. Wills 🔑302(6)**

Evidence was sufficient to sustain finding that decedent's surname inserted in body of instrument admitted to probate as a holographic will was in decedent's handwriting.

**2. Wills 🔑487(1)**

Courts should presume that testator's intention was that of a reasonable and prudent man under the circumstances, and should not adopt a somewhat strained construction to defeat testator's desire.

**3. Wills 🔑302(6)**

Evidence supported findings that written words on document following decedent's signature relating to authenticity of signature were not incorporated in provisions in decedent's handwriting and were not intended to be part of will and that they did not render document invalid as a holographic will. Probate Code, § 53.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the estate of Isaac William Tanner, deceased, wherein Cappietola Carothers offered for probate a document purporting to be the last will and testament of the deceased, and Lewis Tanner opposed its probate. From an order admitting the document to probate, Lewis Tanner appeals.

Affirmed.

Stickney & Stickney and Edward Strop, all of San Diego, for appellant.

A. L. Hubbell, of Escondido, and Sloane & Steiner, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order admitting a document to probate as the last will and testament of the deceased. The document reads as follows:

"Augest 26 1933
"In the Name of God amen.
Tanner
I Isaac William/ of the City of Escondido California County of San Diego Being of sound and, disposing mind and memory and not acting under menace, Fraud or under influence of any person whomsoever, do make publish and declare this to be my Last Will and testament First I give dvise and Bequeath one half of all the Property both personal and real that I may have at the time of my death, to Cappietola Carothers. Second I giv dvise Bequeath the remaining one half of my property both personal and real to be devided equely between my children. Nancy Elizbeth Silcox, William Steward Tanner, Carence Tanner, Arthur Tanner Ella Sargent Alton Tanner, Lewis Tanner. I hav all ready given each of my children land enough to more than take cair of them. Third, I hereby nominate constitute and appoint Cappietola, Carothers the executor of this my Last Will and testament without bond and hereby auithorise and empower her to sel any of my property without order of Court without notice, as she may see fit. I hereby revoke all other Wills maid by me.

"In Witness where of I have here unt set my hand
"Isaac William Tanner

"Witness: I positively know this to be Mr. Tanners signature
"Signed: Ira Hansen
"Robt A Agnew

"We the undersigned at the request of I. W. Tanner in the presence of each other."

This was offered for probate by the respondent, who is named therein as executrix, and its probate was opposed by a son of the deceased, who is the appellant here. The proponent testified that the deceased showed her the will and read it to her at about the time it is dated, telling her that he had included her in the will "for all your kindness to me", and that during his last illness he handed the will to her and said: "You put this away." Mr. Tanner died on December 22, 1937.

The court admitted this instrument as a holographic will, finding "that such will was entirely written, dated, and signed by the hand of the testator himself and no address, date or other matter written, printed or stamped on said document was incorporated in the provisions which were in the handwriting of the decedent".

[1] With one exception, there is no question that all of this document down to and including the signature is entirely in the handwriting of the deceased. The appellant contends that the word "Tanner", which is inserted as the tenth word in the body of the instrument, was written by someone else. Two persons, who qualified as experts, gave an opinion to that effect. Two other witnesses, who had been familiar with the handwriting of the deceased over a period of years, testified that the word in question is in his handwriting. The appellant argues that a comparison of that word with the same word in the signature, as they appear in the photostatic copy of the document in the record, "establishes the fact that the same person did not write both of them". We are unable to agree with this contention. While we are not handwriting experts, the photostatic copy appears to us to support the testimony of the two witnesses who testified that the word is in the handwriting of the deceased. In any event, there is sufficient evidence to support the court's finding.

[2, 3] The main contention is that the document is rendered invalid as a holographic will by the words following the signature of the deceased. It is argued that the deceased dictated this portion to the witness Hansen, who wrote the same on the will; that he and the other witness then signed it; that the deceased then intended and declared that the dictated portion was a part of his will; and that this discloses that the deceased did not intend to dispose of his property by a holographic will. This is based upon a part of Hansen's testimony where he was led to say that the deceased asked that this portion be made a part of his will. In this connection Hansen testified on cross-examination:

"Q. He asked you to write this, did he? A. Yes, sir.

"Q. And to make it a part of his will? A. Yes, sir."

In his direct examination Hansen testified that sometime about August 26, 1933, Mr. Tanner came to his place of business and asked him if he would do him a favor, that at Tanner's request he read the document, and that "he asked me if I would sign it, and I asked him if I had anything to do with the will and he said no, all I was was just merely a witness that would swear that was his signature". He then testified that at Mr. Tanner's request he wrote the words: "Witness: I positively know this to be Mr. Tanner's signature, signed"; and that he and Robt. A. Agnew then signed it. He did not directly testify that he wrote the words "We the undersigned at the request of I. W. Tanner in the presence of each other," but it may be inferred from his testimony that he did so.

It appears from the document that the deceased was not an educated man. While it is apparent that in preparing it he had the benefit of some form of will, there was no completion of an attestation clause. From the face of the document and from Mr. Hansen's testimony the court was justified in concluding that the deceased did not intend that the will should be ineffective until after an attestation clause had been completed. The witness Hansen was told that in writing what the deceased requested him to write he had nothing to do with the will and was merely a witness who could swear that this was the signature of the deceased. It would seem from the words used, as well as from the testimony, that the testator caused them to be placed there for the purpose of supplying proof of his own handwriting. As was said in the somewhat similar case of In re Soher, 78 Cal. 477, 21 P. 8, 9, "And it seems to us that courts should presume that the intention of the testator was that of a reasonable and prudent man, under the circumstances, and should not adopt a somewhat strained construction to defeat what there is every reason to believe was the desire of the testator. The witness clause is not, under the circumstances, to be considered as a portion of the will, which is no more affected by it than any other document which does not require attestation, such as a deed or contract would be."

In our opinion, the written words following the signature on this document are wholly disconnected from the writing itself and form no part thereof. In re Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012. The evidence supports the court's finding that this written matter was not incorporated in the provisions which were in the handwriting of the decedent and its conclusion that the same was not intended as, or to be considered as a part of the will. Probate Code, § 53.

The order is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

33 Cal.App.2d 138

## JOOST v. CASTEL et al.

Civ. 11035.

District Court of Appeal, First District, Division 2, California.

May 31, 1939.

Hearing Denied July 27, 1939.

**1. Landlord and tenant** 🔑76(2), 94½

Provision, in lease, wherein lessee agreed not to assign lease or underlet the demised premises without written consent of lessor, applied to voluntary acts and did not serve to terminate lease on lessee's death before end of term.

**2. Landlord and tenant** 🔑76(2), 94½

Provision, in lease, wherein lessee agreed that lease should not be assignable or transferable by operation of law, but that lease should terminate if lessee should be adjudged bankrupt or insolvent or should make an assignment for benefit of his creditors, did not serve to terminate lease on lessee's death before expiration of term. Civ.Code, § 1934.

**3. Executors and administrators** 🔑208
**Landlord and tenant** 🔑76(2)

An ordinary covenant against assignment does not bind the executors of the tenant and is not broken by a transfer of the leased premises by operation of law.

**4. Courts** 🔑475(2)

Lessor was entitled to maintain suit in equity for sequestration of funds to pay rent to become due from estate of deceased lessee. Probate Code, § 707.

**5. Appeal and error** ⚷1009(2)

Where there was no finding that was not supported by the evidence, decision in equity suit would not be disturbed for alleged insufficiency of the evidence.

**6. Executors and administrators** ⚷134

The fact that liability of estate for rent might be decreased or entirely eliminated did not preclude sequestration of estate's funds for payment of rent to become due.

**7. Executors and administrators** ⚷134

The fact that lessor entered and relet premises did not change lessor's claim against lessee's estate for rent to one for damages, so as to preclude sequestration of funds for payment of rent to become due.

**8. Appeal and error** ⚷936(2)

Presumption was in support of judgment allowing attorney's fees, and against appellants.

**9. Attorney and client** ⚷140

The trial court was not required to adopt expert testimony in fixing amount to be allowed for attorney's fees.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by H. Joost against Edmund E. Castel, executor, and A. E. Levinson, administrator, with the will annexed, of the estate of Charles A. Munroe, also sometimes known and called Charles A. Monroe, deceased, based on two claims filed against the estate of the deceased. Judgment for plaintiff, and defendants appeal.

Affirmed.

Leon Samuels, Hugh K. McKevitt, Douglas A. Nye, and Joseph F. DeMartini, and A. E. Levinson, all of San Francisco, for appellants.

Morris, Jaffa & Sumski, of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff the defendants have appealed.

The action is based upon two claims filed against said estate, both of which were rejected by said representatives. Both claims are based upon a lease made and entered into between H. Joost and Marie A. Joost, as lessors, and Charles A. Munroe, as lessee. The lease was for a period of ten years commencing July 15, 1930. Charles A. Munroe died March 17, 1935.

The amended complaint contained three counts, all of which sought to have the said claims established and approved as valid claims against said estate. The first count stated a cause of action at law to recover rent due at the time of filing said complaint. The second stated a cause of action in equity and sought to have deposited in court the amount of rent which was to become due from and after the date of the filing of said complaint, and up to the end of the term of the lease. The third count also stated a cause of action in equity, and sought to have the court fix the amount of attorney's fees to which the landlord's attorney was entitled under said lease for the bringing of said action, and for such other sums as might contingently become due the lessor under said lease. At the trial, however, the only recovery sought under this third cause of action was the attorney's fees.

The trial court caused a decree to be entered in favor of the plaintiff on each of the three counts. From that decree the defendants have appealed. However, in this court they make no objection to the award on the first count, but they complain of the award made on the other two counts.

The defendants contend that the death of Charles A. Munroe had the effect of terminating the lease. The lease contained numerous covenants. Each paragraph had a heading. Two paragraphs are involved in the contention stated. Those paragraphs were as follows:

"Assignment and Subletting.

"Said lessee agrees not to assign this lease or any interest therein, nor let or underlet the whole or any part of said demised premises, without the written consent of the said lessor first had and obtained; and neither this lease or any interest therein, shall be assigned or assignable by operation of law or otherwise.

"Nontransferable Involuntarily.

"Said lessee hereby agrees that neither this lease nor any interest therein shall be assignable or transferable by operation of law, and it is hereby mutually agreed, covenanted and understood by and between the parties hereto that in the event said lessee be adjudged bankrupt or insolvent, or in the event said lessee makes an assignment for the benefit of his creditors this lease at the option of the lessor shall immediately end and terminate and shall in no wise be treated as an asset of said lessee after the exercise of the aforesaid option; and the lessor shall have the right to forthwith re-enter said premises as of his former and original estate.

"The words 'lessor' and 'lessee' as herein used include, apply to, bind and benefit the heirs, executors, administrators, successors and assigns of the lessor and lessee."

[1-3] In presenting the contention last mentioned the defendants contend that by reason of the covenants quoted the parties agreed that under the facts of this case the lease was terminated. The covenant entitled "Assignment and Subletting" clearly applied to voluntary acts. But the record before us does not disclose voluntary acts. The paragraph entitled "Nontransferable Involuntarily" shows that if an involuntary assignment was made by the lessee the question whether a forfeiture arose rested "* * * at the option of the lessor". Furthermore there was no evidence of either bankruptcy or an assignment for the benefit of the creditors of the lessee. It follows that the lease had not expired by virtue of its own terms. And, we do not understand that the defendants claim, in the absence of a covenant to that effect, that the death of the lessee or of the lessor in a lease will, by operation of law, terminate the lease before the end of the term thereof. Civ.Code, sec. 1934; 15 Cal.Jur. 768. Again it is settled law that an ordinary covenant against assignment does not bind the executors of the tenant and is not broken by a transfer of the leased premises by operation of law. In the case of Stratford Co. v. Continental Mtg. Co., 74 Cal.App. 551, 241 P. 429, after a lease containing a similar covenant had been executed the tenant died. During the administration of the tenant's estate his administratrix sold the leasehold interest. The purchaser went into possession under the assignment. The lessor commenced an action claiming the rights of the lessee had been forfeited. The trial court rendered a judgment against it. The judgment was affirmed by the District Court of Appeal. The Supreme Court denied a transfer. On that authority and the cases cited therein we hold the contention of the defendants may not be sustained.

[4] The defendants next assert that the claims of the plaintiff are not contingent within the meaning of our statutes. They cite several cases involving statutes in bankruptcy. It is not claimed that the statutes are either identical with or similar to the sections of the Probate Code. Those authorities are not helpful. Under facts closely parallel to the facts in the instant case it has been held that similar claims were contingent. Verdier v. Roach, 96 Cal. 467, 474, 475, 31 P. 554; Fratt v. Hunt, 108 Cal. 288, 293, 41 P. 12; Morse v. Steele, 132 Cal. 456, 458, 64 P. 690; Brooks v. Lawson, 136 Cal. 10, 13, 68 P. 97. Continuing the defendants claim that such authorities are not in point because in the instant case the claims of the plaintiff rested on several contingencies. That distinction is not helpful. It could have been made with equal force in any one of the cases just enumerated. However, as will hereinafter more fully appear, we think the distinction has no merit. The defendants also advert to the fact that the claims were not due. That will be conceded at once. Continuing they earnestly contend that whether the claims were "* * * due, not due, or contingent * * *" the plaintiff was bound to present them. Prob.Code, sec. 707. Then, relying upon the proposition just stated, the defendants argue that the plaintiff was not entitled to maintain an action at law to recover thereon, and that the action before us was prematurely brought. Miller v. Miller, 171 Cal. 269, 152 P. 728; Morse v. Steele, supra; Brooks v. Lawson, supra. But, as clearly pointed out by the plaintiff, he did not commence an action at law on the items referred to but commenced an action in equity. As to plaintiff's action in equity the defendants cite no authorities to the effect that said action was brought prematurely.

In what we have just said we assumed that under a proper set of facts the plaintiff was entitled to enforce his rights by maintaining an action in equity. The defendants cite no authorities to the contrary. In our reading we have not found any disagreement in the authorities. It seems to be the settled law, both in England and America, that such actions are proper. 1 Pom.Eq.Jur., sec. 112, subd. 7, div. 3; 3 Pom.Eq.Jur., sec. 1154; Verdier v. Roach, supra; Newman v. Burwell, 216 Cal. 608, 612, 15 P.2d 511; Dabney v. Dabney, 9 Cal. App.2d 665, 671–673, 51 P.2d 108; Bankers' Surety Co. v. Meyer, 205 N.Y. 219, 98 N. E. 399, Ann.Cas.1913D, 1218. In the case last cited, Bankers Surety Co. v. Meyer, the facts were that the decedent had executed five promissory notes which would not be due until after the date for closing the estate. The holder commenced an action in equity to establish the validity of its notes and obtain equitable relief. On page 224 of 205 N.Y., on page 400, of 98 N.E., Ann.Cas.1913D, 1218, the court said: "Ordinarily, where the Surrogate's Court has ample power to protect the rights of the parties by enforcing a just and proper administration of a decedent's assets, the Supreme Court will not undertake the administration of his estate. But it is well established that when a Surrogate's Court, with its limited jurisdiction, is unequal to the task of grappling with special circumstances, the Supreme Court will entertain jurisdiction and avoid a failure of remedy or a miscarriage of justice. Hard v. Ashley, 117 N.Y. 606, 23 N.E. 177; Haddow v. Lundy, 59 N.Y. 320, 326; Matter of Smith, 120 App.Div. 199, 105 N.Y.S. 223; Post v. Ingraham, 122 App.Div. 738, 107 N.Y.S. 737. This is a case within the exception, and the form of the relief which plaintiff asks is sanctioned by authority, as well as principles of justice. It does not seek to recover a judgment on its notes. It asks that an action may be maintained to establish their validity, and that the plaintiff is a creditor of the estate of the decedent and entitled to share in its distribution." We conclude therefore it is well settled that under certain circumstances a claimant may apply to a court of equity to protect and enforce rights when, as here, the statute has not conferred full powers on the probate court.

[5] The defendants then assert the evidence was insufficient to justify the decision. The judgment, as recited above, was a decree in equity. That decree was based on a set of findings that appears to be full and complete. The defendants do not specify any finding that was not supported by the evidence. From our examination we find no finding, material to the action, that was not supported by substantial evidence. However, if we go behind the findings, the facts were as follows: The property described in the lease was occupied by Charles A. Munroe as a store and factory. He had conducted a factory making women's apparel and selling the same. For some time prior to his death he employed Reinhold Henzschel as a foreman or manager. Moreover, in his will the decedent bequeathed said business to Mr. Henzschel. Before vacating the leased premises the defendants did not find a tenant ready, able and willing to take over the leasehold at any set price and did not introduce any such person to the plaintiff. They talked to a realtor who in turn interviewed Mr. Paul of Eureka, but no effort was made to enter into a binding contract with him as a tenant of the premises. After the defendants vacated the premises the plaintiff rented the same to Mr. Henzschel at a reduced rent. The defendants now complain that the plaintiff did not do all he should have done to mitigate their damages. It is sufficient to state that all of these matters were presented to the trial court and after hearing all the evidence the trial court made findings against the defendants. There was no finding that was not supported by the evidence.

[6, 7] The decree appealed from operates indirectly to establish and protect the plaintiff's primary rights. It does not expressly nor directly declare, establish or enforce the ultimate right, estate, or interest of the plaintiff; but its object is to perfect and complete the means by which such right, estate, or interest is evidenced or secured, or to remove obstacles which hinder the enjoyment of such right. 1 Pom.Eq.Jur., sec. 171, p. 214. In other words the equitable action does not purport to hear and determine the ultimate amount of the contingent claim. But it does purport to lay a foundation on the basis of which such a determination can at the proper time be made. Apparently failing to take into consideration the exact terms of the judgment, the defendants make these objections. (1) They again point out that there are a number of contingencies on the happening of which their liability may be decreased or entirely eliminated. Conceding such to be the facts, they can be and doubtlessly will be duly inquired into at the proper time and in the proper court. (2) Because the plaintiff entered, and relet the premises, the defendants assert their liability, if any, is for damages and not for rent. That assertion is not well founded. Phillips-Hollman, Inc., v. Peerless Stages, 210 Cal. 253, 261, 291 P. 178. Moreover, whether the liability of the defendants rests on a claim for rent or a claim for damages, such fact, if material, will likewise be inquired into in due time. Verdier v. Roach, supra.

[8, 9] The last contention made by the defendants is that the allowance of attorney's fees was unauthorized. They do not contend the lease did not contain a covenant on that subject. They seem to contend that the trial court based its award on some matters that were not factors contained in

said covenant. The record does not support them. No part of the record is called to our attention showing that any immaterial matter entered into the determination of the liability of the defendants under the covenant to pay attorney's fees. The presumption is against the defendants and in support of the judgment. As to the amount of the award we understand the defendants to contend the trial court did not adopt the testimony given by certain expert witnesses. Of course, it was not bound to do so. Zimmer v. Kilborn, 165 Cal. 523, 132 P. 1026, Ann.Cas.1914D, 368.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

33 Cal.App.2d 53

## MITCHELL, Insurance Commissioner, v. PACIFIC GREYHOUND LINES, Inc., et al.

**Civ. 11037.**

District Court of Appeal, First District, Division 2, California.

May 25, 1939.

Rehearing Denied June 24, 1939.

Hearing Denied July 24, 1939.

**1. Insurance** 🔑**12½**

Under the Reciprocal or Interinsurance Act referring to a reciprocal or interinsurance exchange as an organization and under the Liquidation Act which applies to all associations subject to examination by Insurance Commissioner or doing business of insurance in the state, an exchange should be treated as an entity for the purposes of liquidation as well as for the purposes of regulation and supervision. St.1919, p. 265, § 1; St.1921, p. 1599.

**2. Insurance** 🔑**12½**

Under the Reciprocal or Interinsurance Act referring to a reciprocal or interinsurance exchange as an organization, and under the Liquidation Act which applies to all associations subject to examination by Insurance Commissioner or doing business of insurance in the state, an exchange was subject to liquidation, and an order appointing a liquidator was not in excess of the court's authority in liquidation proceeding. St.1919, p. 265, § 1; St.1921, p. 1599.

**3. Insurance** 🔑**12½**

The Reciprocal or Interinsurance Act, the Liquidation Act, and the contracts of subscribers of reciprocal or interinsurance exchange must all be read and considered together for purpose of determining propriety of judgment declaring method to be employed in determining subscribers' liability upon liquidation. St.1919, p. 265, § 1; St. 1921, p. 1599.

**4. Insurance** 🔑**12½**

Under the Reciprocal or Interinsurance Act, the Liquidation Act, and the contracts of subscribers of a reciprocal or interinsurance exchange, subscribers were subject to a limited assessment liability upon liquidation of exchange, and trial court properly held that subscribers' obligations were enforceable by liquidator as against contention that obligations were not assets of exchange and were enforceable only by creditors in actions against subscribers. St.1919, p. 265, § 1; St.1921, p. 1599.

**5. Insurance** 🔑**12½**

The legislation expressly authorizing levy of an assessment upon liquidation of a reciprocal or interinsurance exchange was enacted for purpose of clarifying previously existing rights and duties of a liquidator as well as for purpose of making changes in the law with respect thereto. St.1935, p. 569 et seq., § 1390 et seq.

**6. Insurance** 🔑**12½**

The trial court properly held that liability of subscribers of reciprocal or interinsurance exchange upon liquidation of exchange should be determined on an annual basis, as against contention that liability should be computed on a daily basis, where there were 65,000 subscribers, contracts of indemnity were written on an annual basis and for an agreed annual amount, and proportionate liability was to be in proportion that a subscriber's basic annual deposit bore to the aggregate of all basic annual deposits. St.1921, p. 1599.

**7. Insurance** 🔑**12½**

In liquidator's action for a judgment declaring among other things method to be employed in determining liability of subscribers of reciprocal or interinsurance exchange, trial court was required to construe subscribers' contracts in a manner which would make them reasonable and practical and in line with the apparent intention of the parties. Civ.Code, § 1643.

**8. Insurance 🔑12½**

The provisions of the Liquidation Act stating that the rights of all persons shall be fixed as of the date of entry or order directing liquidation must be read into contracts of subscribers of reciprocal or interinsurance exchange, where those provisions were in effect when contracts were made, and hence right of action of liquidator of exchange to enforce subscribers' liability would not arise until assessment was ordered by court in liquidation proceeding. St.1919, p. 266, § 4.

**9. Insurance 🔑12½**

The paragraph of contracts of indemnity issued by reciprocal or interinsurance exchange providing for a limitation of 90 days after right of action accrues to an action brought by a subscriber for money actually paid in satisfaction of a judgment contemplates actions brought while exchange is a going concern and not to an action brought by a liquidator appointed to liquidate the exchange. St.1919, p. 266, § 4.

**10. Parties 🔑23**

A liquidator's action for a judgment declaring among other things method to be employed in determining liability of subscribers of reciprocal or interinsurance exchange was a proper case for application of doctrine of virtual representation where several questions which were of common and general interest to all subscribers were involved, there were 65,000 subscribers, and it was impracticable to bring them all before the court. Code Civ.Proc. § 382.

**11. Parties 🔑23**

Subscribers of a reciprocal or interinsurance exchange who were made defendants in liquidator's action for a declaratory judgment concerning method to be employed in determining subscribers' liability could not contend that doctrine of virtual representation could not be applied where they showed no prejudice to themselves by reason of application of doctrine. Code Civ.Proc. § 382.

**12. Insurance 🔑12½**

Where a reciprocal or interinsurance exchange becomes insolvent, a subscriber may not set off his claim as a creditor against his liability as an insurer.

**13. Insurance 🔑12½**

Certain subscribers of reciprocal or interinsurance exchange could not offset against any liability as subscribers upon liquidation their claims as creditors for money expended in defense and settlement of claims under agreements made with attorney in fact of exchange, where effect of agreements would be to grant to those subscribers an advantage over other subscribers and creditors, since agreements were in excess of authority of attorney in fact.

**14. Insurance 🔑12½**

Certain subscribers of reciprocal or interinsurance exchange could not offset against any liability as subscribers upon liquidation their claims as creditors for money expended in defense and settlement of claims under ex parte orders made in liquidation proceeding, where portions of orders relating to set-off were specifically made subject to court's approval on matter of reasonableness, and trial court found that allowance of set-off would be unreasonable, inequitable, and unjust toward other subscribers.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by E. Forrest Mitchell, Insurance Commissioner, as liquidator of the California Highway Indemnity Exchange, insolvent, wherein Samuel L. Carpenter, Jr., Insurance Commissioner, was substituted as liquidator, against the Pacific Greyhound Lines, Inc., and others for a declaratory judgment declaring among other things the method to be employed in determining defendants' liability as subscribers of the Exchange. From the judgment, defendants appeal.

Affirmed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

H. C. Lucas, of San Francisco, Bryce P. Gibbs, of Los Angeles, and Martin Minney, Jr., and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

Daniel W. Burbank and Burbank & Laumeister, all of San Francisco, for respondent.

Sheridan Downey and Sheridan Downey, Jr., both of San Francisco, amici curiae in support of respondent.

SPENCE, Justice.

Plaintiff, acting as the liquidator of California Highway Indemnity Exchange.

brought this action against the defendant subscribers of said exchange, seeking a declaratory judgment declaring among other things the method to be employed in determining the liability of the subscribers. From the judgment entered by the trial court, defendants appeal.

The California Highway Indemnity Exchange was a reciprocal or interinsurance exchange organized under the act of 1921 known as the Reciprocal or Interinsurance Act. Stats.1921, p. 1599. Said act will be hereinafter referred to as the "reciprocal act". On June 19, 1931, plaintiff was appointed by the superior court as liquidator thereof. In the liquidation proceeding, the court found that the organization was insolvent, having an excess of liabilities over assets estimated at approximately $890,000. The decree ordered that the business be liquidated and that the liquidator take possession and act "for the benefit of its policyholders, its creditors and the general public". All creditors were restrained from bringing any action without permission of the court. Thereafter, the liquidator was instructed by the court in which the liquidation proceeding was pending to bring this action for declaratory relief. The action was brought against defendant subscribers on the theory of virtual representation of all of some 65,000 subscribers and purported to settle certain questions common to all of the subscribers under the common form of contract and power of attorney of each subscriber.

On this appeal from the judgment in the declaratory relief action, defendants have made a collateral attack upon the order appointing the liquidator and have also attacked the provisions of the judgment relating to the manner of computing the liability of the subscribers. It therefore appears appropriate to summarize certain of the pertinent provisions of the act under which the exchange was organized, of the written instruments used in the conduct of the business of the exchange, and of the act under which the liquidation proceedings were instituted.

The Reciprocal or Interinsurance Act of 1921, Stats.1921, p. 1599, is entitled "An act providing for the organization and regulation of reciprocal or interinsurance exchanges * * *." It authorized "subscribers" to exchange interinsurance contracts with each other and states, "The organization under which such subscribers so exchange contracts shall be termed a reciprocal or interinsurance exchange, hereinafter referred to as the exchange." Sec. 1. It authorizes the execution of contracts of insurance by an attorney-in-fact for the subscribers and permits the power of attorney to impose "restrictions upon the exercise of the power granted as may be agreed upon by the subscribers, including the right to fix the contingent liability of the subscriber for the payment of losses in excess of the available cash funds in the possession of the exchange, and may further provide for the exercise of any right reserved to the subscribers directly or through a board or other body. * * *" Such board or other body is given "supervision over the finances of the exchange and over its operations to the extent that said operations shall be in conformity with the subscriber's agreement and power of attorney". Sec. 2. A declaration is required to be filed with the insurance commissioner setting forth various required facts including the name under which contracts are to be issued, which name must not be confusingly similar to that of any other insurance organization; the location of the principal office of the exchange; the execution of contracts by a minimum number of subscribers and the possession of the required minimum assets. Sec. 3. It also requires that a written instrument be filed authorizing service of process on the attorney-in-fact or upon the insurance commissioner which service is made "binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney". A judgment rendered following such service is made "binding against any and all subscribers as their interests appear". It also provides that "The exchange may sue or be sued in its own name * * *." Sec. 4, subd. a. A bond is required of the attorney-in-fact, which bond may be sued upon by the subscribers or "in case of liquidation or receivership, by the receiver or trustee in liquidation" of the exchange. Sec. 4, subd. b. Certain amounts of cash and securities are required to be maintained and "If at any time the assets so held in cash or such securities shall be less than the reserves as required * * *, the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the insurance commissioner so to do * * *." The return of savings to subscribers is permitted when "such returns do not constitute an impairment of the assets or reserves to be maintained as herein required". Sec. 5. Annual reports are required and it is provided that, "The assets, business affairs and records of such organizations shall be subject to examination by the insurance commissioner at any reasonable time. * * *". Sec. 6. Provision is made for the licensing and the renewing of licenses by the insurance commissioner. Sec. 8. Various penalties are provided including the suspension or revocation of licenses in the event of failure to comply with all the provisions of the act. Secs. 9 and 10. The fees and annual taxes upon the "gross premium deposits collected from subscribers" are the same as those paid by mutual companies. Sec. 11. Provisions and conditions in the policies required by the reciprocal plan are permitted provided they are not in conflict with the laws of the state. Sec. 12. It is further provided that "Except as herein provided, the making of contracts as herein provided for and such other matters as are incident thereto shall not be subject to the laws of this state relating to insurance unless they are therein specifically mentioned", but that the provisions of the act shall not be construed as depriving the insurance department "of the right of examination of and supervision over reciprocal or interinsurance exchanges, their agents and brokers. * * *" Sec. 13, subd. a. Rebates, as therein defined, are prohibited. Sec. 13, subd. b.

The insurance commissioner had issued a license under said act to "California Highway Indemnity Exchange of Los Angeles, California, represented by Automobile Underwriters, Inc. of Los Angeles, as its attorney-in-fact, to transact business of liability and automobile insurance, on the interinsurance plan, within this state". Thereafter the exchange was in operation for many years, using a common form of subscriber's agreement and power of attorney which was executed by each subscriber at the time of making application for insurance.

The instrument so executed was entitled "Subscriber's Agreement and Power of Attorney". The subscribers thereby appointed Automobile Underwriters, a corporation, as the attorney-in-fact "for us, and in our name, place, and stead, or in the name of the Exchange" to exchange indemnity with other subscribers and to conduct generally the business of the exchange including the execution and cancellation of contracts, called policies. (Par. 1.) It provided that the attorney should have no power to make the subscribers "jointly liable with any other subscriber" and that every liability incurred by the subscriber should be "several and not joint and is to be limited as herein provided". (Par. 2.) The attorney was authorized to deduct and retain thirty per cent of all moneys received, out of which said attorney was to defray "all expenses incident to conducting the exchange of indemnity hereunder, except license fees, taxes, excess insurance, reinsurance, legal, loss claims, preventative and Advisory Board expense". (Par. 3.) An advisory board of five subscribers was created (Par. 4), to "have supervision of subscribers' funds and all such funds shall be deposited in a bank or invested in securities, approved by it. * * * After the determination, adjustment or compromise of any loss, claim, or expense, chargeable against subscribers, by our Attorney as above provided, the Advisory Board and our Attorney are hereby authorized and instructed to pay our portion thereof". (Par. 5.) The subscribers agreed to accept the policies issued pursuant to their applications and to pay an amount equal to twenty-five per cent "of our total basic annual deposit" and to pay monthly eight and one-third per cent of the "total basic annual deposit". Savings were to be returned to the subscribers, when available, whenever the Advisory Board and attorney might determine. (Par. 6.) It was also provided that "We hereby subscribe, subject to the call of the Advisory Board, a sum equal to our total basic annual deposit, to pay excess losses incurred under this contract". (Par. 7.) The agreement was limited to the purpose therein expressed and could be terminated by the subscriber or attorney upon five days' notice. (Par. 8.)

The application accompanying the subscribers' agreement and power of attorney was addressed to the "California Highway Indemnity Exchange". On the outside of the policies, or contracts of indemnity, were the words "Automobile Policy—California Highway Indemnity Exchange". The body of each policy was headed "Subscribers at California Highway Indemnity Exchange" and each policy was countersigned by the attorney-in-fact. Said policies provided for cancellation by the subscriber or attorney upon five days' notice and the return of the "unused portion of the deposit". (Par. 10.) It provided, "It is understood and agreed that the indemnity granted by each participating subscriber, as if a separate contract were issued therefor, shall be that proportion of the aggregate indemnity granted hereunder that such subscriber's basic annual deposit bears to the aggregate of all basic annual deposits under contracts in effect and participating in such loss, at the time of the loss". (Par. 12.) It also provided that no action should lie against the attorney or any subscriber to recover on any loss unless brought by the subscriber himself and "within ninety days after the right of action accrues as herein provided * * *" (Par. 13); and further that no action should be maintained under the policy "against more than one of the subscribers at any time"; that the attorney was authorized to "receive and admit service"; and that "a final decision in such suit * * * shall be taken to be decisive of a similar claim * * * against each of the other subscribers, absolutely fixing his liability in the premises. * * *" (Par. 14.)

From what has been said, it is apparent that a reciprocal "organization" differs in many respects from the ordinary stock or mutual insurance company. It has no stock and no capital as such. Its operating fund consists of the premiums paid for its policies and the earnings on any investment of those premiums. The contingent liability of the subscribers, Sec. 2, to pay sums in addition to their premiums stands in the place of the capital of the stock company and the liability of the subscribers to meet such contingent liability may be likened in some respects to the liability to pay unpaid stock subscriptions to a stock company. The plan appears to be designed for those who desire to assume the position of both the insurer and insured with a view to eliminating that part of the ordinary insurance premium which goes into profit. As rates for automobile insurance are not fixed by law in this state but by the insurer, it is clear under the plan that the subscribers delegate this duty of fixing rates to the attorney and that the subscribers face the risk that the rates fixed by the attorney may be inadequate. If the rates so fixed are inadequate, it is clear that the plan contemplates that the contingent liability will arise. It will be noted that section 2 of the act gives the right to limit "the contingent liability * * * for the payment of losses" but not for other expenses; also that paragraph 7 of subscribers' agreement and power of attorney limited the subscription to pay "excess losses", to a sum equal to "our total basic annual deposit".

Turning to the so-called liquidation act Stat. 1919, p. 265, we find that there are but few provisions which need be mentioned in this discussion. The title of said act reads, "An act to provide for proceedings against and liquidation of delinquent insurance corporations and associations". Section 1 provides, "This act shall apply to all corporations and associations which are subject to examination by the insurance commissioner, or which are doing or attempting to do or representing that they are doing the business of insurance in this state * * *; and the words 'corporation' or 'corporations' herein shall also include all such associations, as well as all voluntary or unincorporated associations. * * *" The word "corporation" is thereafter used throughout the act in the sense above set forth. The procedure for liquidation is set up in section 4 of the act, which also provides, "The rights and liabilities of any such corporation, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation * *." Section 11 of the act relates to the service of the order to show cause and other papers and provides for the manner of service when the officers of a corporation "or, if a Lloyds association or inter-insurance exchange be named in the order to show cause, the duly designated attorney-in-fact, have departed from the state or keep themselves concealed therein * * *."

The complaint in the present action set forth the essential facts including those relating to the necessity for bringing the action on the theory of virtual representation. It was alleged therein that said exchange was composed of several thousand subscribers; that the questions involved were of common and general interest to said subscribers; that it was impractical to bring all of said subscribers before the court; and the defendants were named as representatives of all of the subscribers as a class for the purpose of determining the rights and liabilities of said subscribers as a class. It was further alleged that a controversy existed in that defendants and certain other subscribers denied liability for any assessment or for any sums in addition to the premium deposits called for in their contracts and also claimed that they were entitled to set-off against their liability, if any, the sums expended by said subscribers in the payment of losses upon risks covered by their contracts. It was therefore sought to have the liability of the subscribers declared; to have the method determined for computing the liability of the subscribers; and to have a declaration that said subscribers were not entitled to offset against said liability any sums paid out for losses upon the risks covered by their contracts.

Defendants denied many of the allegations of the complaint and set forth certain affirmative allegations. The issues, however, were narrowed upon the trial by admissions that defendants had been subscribers for varying periods prior to August, 1930; that each subscriber had agreed to deposit a basic annual premium and to pay a sum equal thereto to pay excess losses; that the relative liability of subscribers was that proportion which the individual subscriber's basic annual deposit or earned premium bore to the aggregate of all basic annual deposits or earned premiums; that the "basic annual deposit" meant the total earned premium on each contract; and that a subscriber did not escape liability for losses while he was a subscriber by withdrawing from the exchange. Defendants nevertheless claimed that the order appointing the liquidator was a void order; that there was no liability on their part which could be enforced by the liquidator by way of assessment; that if any liability did exist, it should be computed on a day to day basis; that the time had expired within which their liability, if any, could be enforced; that they were entitled to a set-off against the liability, if any; and that the theory of virtual representation could not be applied.

The trial court found and concluded among other things that plaintiff was the duly appointed liquidator; that each subscriber had agreed to pay a sum equal to the subscriber's total basic annual deposit to pay excess losses incurred under the contract; that the terms "total basic annual deposit" and "basic premium deposit" were synonymous and were intended to mean "the total annual earned payments agreed to be paid by the insured subscriber under each contract of indemnity"; that an actual controversy existed regarding the rights and duties of the subscribers and the rights and duties of plaintiff to enforce payment from the subscribers; that the questions involved in said controversy were of common and general interest to all subscribers; and that the defendants were representative of all subscribers for the purpose of determining such questions. It further found and concluded plaintiff became vested with all property, contracts and rights of action of the exchange as of June 19, 1931; that the rights of the exchange and of all persons with respect thereto became fixed as of that date; that all subscribers within four years prior to the decree of liquidation became liable for assessment to pay proportionately both losses and other expenses assumed under their contracts; that the liability of each subscriber for unpaid losses in each year of his membership was limited to an amount in addition and equal to the subscribers total basic annual deposit; that the subscribers were not entitled to set-off their claims as creditors against their liability as insurers; that for the purpose of computing the liability of the subscribers as insurers, it was in the interest of economy and expedition and in avoidance of unnecessary wastefulness that such liability should be computed in four separate annual periods dating back from June 19, 1931, by determining the unpaid losses and expenses for each of said years and applying "the ratio which the individual subscriber's total annual premium deposit bears to the sum total of all basic annual premium deposits payable by all subscribers for each year"; that plaintiff should report his computations as decreed to the court in which the liquidation proceeding was pending and make application for an order authorizing an assessment upon the subscribers in accordance therewith; that if any subscriber not named as a defendant had a defense personal to himself, such defense was saved and might be asserted; that jurisdiction should be reserved to the court in which the liquidation proceeding was pending to act upon the application for an order for an assessment and to modify the method of computation as to any subscribers as to whom said court should find that, by reason of special circumstances, an assessment computed as above set forth would operate unequally or inequitably; and that the statute of limitations would not run until such assessment was levied. Judgment was entered accordingly.

[1, 2] Defendants contend that the trial court was without jurisdiction to direct

the plaintiff to determine the liability of the subscribers as the appointment of plaintiff as liquidator was "in excess of the authority" of the court in the liquidation proceeding. This contention is referred to by defendant as "the major point presented on this appeal". It is in the nature of a collateral attack upon the order of appointment of plaintiff as liquidator and we will assume, without deciding, that the point may be raised on this appeal under the record here presented. We find no merit, however, in said contention. Defendants argue that a reciprocal exchange is not an entity but a mere place for the exchange of insurance contracts which cannot become insolvent and subject to liquidation. We need not enter into an academic discussion as to whether a reciprocal exchange is or is not a legal entity for all purposes. Nor need we discuss the decisions from other jurisdictions involving various statutes relating to reciprocal exchanges. A reading of the reciprocal act and of the liquidation act of this state, which acts are summarized above, leads us to the conclusion that a reciprocal exchange is to be treated as an entity for the purposes of liquidation, as well as for the purposes of regulation and supervision. Said reciprocal act refers to such an exchange as an "organization" sec. 1, and the California Highway Indemnity Exchange was referred to in its own contracts as "an association". The liquidation act applied "to all * * * associations which are subject to examination by the insurance commissioner, or which are doing or attempting to do or representing that they are doing the business of insurance in this state * * *." The quoted language is quite broad and there can be no doubt that it was intended to treat reciprocal exchanges and all organizations and associations engaging in the insurance business as entities subject to liquidation. But if any doubt might be said to exist after reading the language of said two sections of the acts, such doubt is entirely dispelled by the reference to the "liquidation of the exchange" in section 4, subdivision (b) of the reciprocal act and the reference to an "inter-insurance exchange" in section 11 of the liquidation act. Defendants point to section 13 of the reciprocal act which provides that "the making of contracts * * * and such other matters as are incident thereto shall not be subject to the laws of this state relating to insurance unless they are therein specifically mentioned." This section has no application to the point under discussion. It refers only to the making of contracts and other matters incident thereto. Furthermore, even if it be given a broader meaning, we have pointed out above that interinsurance exchanges are "specifically mentioned" in the liquidation act. We therefore conclude that the California Highway Indemnity Exchange was subject to liquidation under the liquidation act and that the order appointing plaintiff as liquidator was not in excess of the authority of the court in the liquidation proceeding. This view finds support in Mitchell v. Lay, 9 Cir., 48 F.2d 79. See, also, Irwin v. Missouri Valley Bridge & Iron Co., 7 Cir., 19 F.2d 300; McAlexander v. Waldbieser, 207 Ind. 531, 192 N.E. 425; W. R. Roach & Co. v. Harding, 348 Ill. 454, 181 N.E. 331.

[3-5] Defendants further contend that there is no provision for an assessment either in the reciprocal act or the contracts executed by the subscribers. It may be at once conceded that the word "assessment" is not used in the act or in the contracts, but that fact is not conclusive upon the question of the propriety of the judgment before us. A reading of the briefs shows that defendants do not seriously contend that they had not assumed contractual obligations to pay sums in addition to their annual basic deposits under their contracts. They apparently contend, however, that these obligations on the part of the subscribers were not assets of the exchange; that these obligations were enforceable only by the creditors themselves in actions against the subscribers and were not enforceable by plaintiff, as liquidator of the exchange. They call attention to subsequent legislation expressly authorizing the levy of an assessment upon liquidation of a reciprocal or interinsurance exchange. Insurance Code, sec. 1390 et seq., St.1935, p. 569 et seq., and argue that no such authority existed under the act of 1921 or the contracts of the subscribers.

For the purpose of determining the propriety of the trial court's judgment in the present case, we believe that the reciprocal act, the liquidation act and the contracts of the subscribers must all be read and considered together. When so read, we believe that said acts and said contracts justify said judgment, which, in effect, declared that the subscribers were subject to a limited assessment liability upon liquidation of the exchange. We have heretofore expressed the view that a reciprocal or interinsurance exchange organized under said reciprocal act should be treated as an entity subject to liquidation under the liquidation act. The only possible assets of such an exchange in liquidation are the ordinary assets remaining on hand at the time of liquidation together with the obligations of the subscribers to pay the contingent liability provided in their contracts. We believe that the last mentioned obligations of the subscribers should be held to be enforceable by the liquidator and should be treated as assets of the exchange in liquidation. To hold otherwise would mean that each creditor would be compelled to bring actions against thousands of subscribers for the purpose of enforcing the several liabilities of the subscribers for their proportionate shares of such creditor's claim. This would tend to make the whole plan provided for the operation of reciprocal organizations impractical and unworkable and would defeat, at least in a large measure, the apparent intent and purpose of the liquidation act in its application to the liquidation of such organizations. We are therefore of the opinion that the trial court properly held that the obligations of the subscribers were enforceable by the liquidator under the acts above referred to and the contracts of the subscribers. See Sergeant v. Goldsmith Dry Goods Co., 110 Tex. 482, 221 S.W. 259, 10 A.L.R. 742. We are further of the opinion that the subsequent legislation found in the insurance code on this subject was enacted for the purpose of clarifying the previously existing rights and duties of a liquidator in liquidation of a reciprocal or interinsurance exchange as well as for the purpose of making certain changes in the law with respect thereto.

[6, 7] Defendants further contend that the trial court's decision as to the method to be followed in determining the subscribers' liability violated their "contractual and statutory rights". This contention is based upon the fact that the trial court declared that the subscribers' liability should be determined upon an annual basis as above indicated while defendants contend that the subscribers' liability should be computed upon a daily basis. Defendants rely mainly upon the language of section 4(a) of the reciprocal act which refers to "such proportion as his interest may appear upon the date that the cause of action arose", and also paragraph 12 of the policy, or contract of indemnity, which provided, "It is understood and agreed that the indemnity granted by each participating subscriber, as if a separate contract were issued therefor, shall be that proportion of the aggregate indemnity granted hereunder that such subscriber's basic annual deposit bears to the aggregate of all basic annual deposits under contracts in effect and participating in such loss, at the time of the loss." These provisions, however, must be read in the light of all other provisions of the contracts and of said acts; and the contracts of the parties must be given a reasonable and practical construction and one which is capable of being carried into effect, if that can be done without violating the intention of the parties. Civ.Code, § 1643.

As we read the contracts of the parties, they were not so clear and unambiguous as to leave no room for construction as claimed by defendants. They contained no detailed specification of a method to be employed in computing the proportionate liability of each subscriber. All contracts of indemnity were written upon an annual basis and for an agreed annual amount, which amount was either a definite amount or a definite amount plus an amount to be subsequently determined upon a mileage basis. The proportionate liability was to be in proportion that a subscriber's basic annual deposit bore to the aggregate of all basic annual deposits. The problem presented to the trial court was to construe said contracts in a manner which would make them reasonable and practical and in line with the apparent intention of the parties. The trial court concluded that this might be done by determining the unpaid losses and expenses for each of the four years preceding the decree of liquidation and applying "the ratio which the individual subscriber's total annual premium deposit bears to the sum total of all basic annual premium deposits payable to all subscribers for each year".

The problem presented was a very practical one. There were some 65,000 subscribers. It appears that the computations required to compute their several liabilities for each of four annual periods will be a tremendous task involving the expenditure of a large amount of time and money. The testimony showed that the expense involved would increase proportionately as the length of the period for which such computations were made was shortened. It is therefore apparent that if such computations were to be made as to each subscriber for each day of the four-year period, the number of computations required would approach astronomical figures. The cost of making such number of computations would probably exceed the entire amount which could ultimately be recovered from the subscribers on their respective liabilities as thus determined. It cannot be assumed that the parties intended that their contracts should be so construed as to defeat the purpose of the contingent liability clauses whereby they agreed to assume an added liability for the purpose of their reciprocal indemnification.

Somewhat similar situations have been presented to the courts. In some of the cases, mutual companies have been involved but the same reasoning applies here in determining the basis for such computations. In Lincoln Bus Co. v. Jersey Mutual Cas. Ins. Co., 112 N.J.Eq. 538, 165 A. 112, at page 114, the court said: "The receiver's proposed assessment is for losses by calendar years. It is objected that, as each policyholder is liable only for losses occurring during the life of his policy (Columbia Fire Ins. Co. v. Kinyon, 37 N.J. L. 33), it is inequitable to levy for losses during a period of the calendar year when he was not a member. The policy years of the 2,400 policies overlapped. There were daily additions and withdrawals. Over 700 claims have been filed with the receiver; several hundred claims are in litigation, and others may yet be instituted. The accounting work in connection with the preparation of this assessment is a volume of many pounds and represents an investment of probably $10,000. If the objectors' assessment theory be adopted with respect to every loss which has been sustained, the amount realized from the assessment will not be sufficient to pay for the accounting services required to levy the assessment. In an assessment as we have here, such an exactitude would defeat assessment. It is sufficient, if the assessment is based upon a fair method of calculation, is equally applied, and is substantially correct. * * * The plan of the receiver is approved." See, also, Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 S.W. 662; Stoddard v. Manzella, 123 Misc. 672, 206 N.Y.S. 140; Fishback v. Bothell Bus. Co., 150 Wash. 49, 272 P. 67.

In Fishback v. Bothell Bus Co., supra, the computations had been made upon a monthly basis and it was argued that they should have been made upon a daily basis. The court there said 150 Wash. 49, 272 P. at page 70: "But the statute must be given a practical meaning. The testimony in this case shows without any contradiction whatever that a vast amount of time has been necessarily spent by the department, with all its knowledge and experience in such matters, in working the matter out on the plan adopted. It also further shows that, while the technical plan suggested by appellant of a day to day period, rather than monthly periods, where there are altogether thousands of outstanding policies, dating from noon on the day of executing the policy, and the consequent necessity of ascertaining whether a given loss occurred before or after noon would be an almost limitless task, necessitating an expense nearly 30 times the cost of the present plan, which in this case would equal or exceed the outstanding liabilities and hence would be unreasonable and impractical."

We therefore conclude that the trial court properly construed the contracts so as to make them reasonable, practical and workable and that said construction is in line with the intention of the parties so far as their intention may be gleaned from their contracts.

[8, 9] Under the same headings, defendants make reference to the statute of limitations. They claim that their liability, if any, is upon contract and "any action to enforce such liability must be brought within four years from the date upon which the right of action accrued". Their argument is based largely upon the claim that the liquidation act "has no application to the affairs or obligations of subscribers at a defunct reciprocal exchange". We have heretofore held that this argument is untenable. The liquidation act provides that unless otherwise directed, the rights of all persons shall "be fixed as of the date of entry of the order directing the liquidation". § 4. The court in the liquidation proceeding restrained the bringing of any actions thereafter and limited the effect of its judgment to those losses and expenses incurred within four years prior to the order directing the liquidation and to those persons who were subscribers within that period. The provisions of the liquidation act were in effect at the time the subscribers' contracts were made and must be read into said contracts. We are therefore in accord with plaintiff's contention that in view of the provisions of said act, the right of action

of the liquidator to enforce the liability of said subscribers will not arise until the assessment is ordered by the court in the liquidation proceeding. See Fishback v. Lewis, 170 Wash. 39, 15 P.2d 658; Langworthy v. Garding, 74 Minn. 325, 77 N.W. 207; Conway v. Northside Lumber Co., 141 Misc. 231, 252 N.Y.S. 476. Defendants also call attention to the provisions of paragraph 13 of the policy or contracts of indemnity, providing for a limitation of "ninety days after the right of action accrues". It seems entirely clear from a reading of said paragraph that it refers only to actions "brought by the subscriber himself * * * for moneys actually paid by him in satisfaction of a judgment" and contemplates actions brought while the exchange is a going concern and not to an action brought by a liquidator appointed to liquidate such an exchange.

[10, 11] It is further contended by defendants that the doctrine of virtual representation finds no application in the instant case". We do not believe any extended discussion of this contention is required. This appears to be a typical case for the application of said doctrine. Section 382 of the Code of Civil Procedure states, "* * * when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all". See, also, 20 Cal.Jur. 482, § 7; 3 Cal.Jur. 358, § 10. There were several questions involved which were of common and general interest to all subscribers. Said subscribers were numerous and it was impracticable to bring them all before the court. But in any event, we do not believe this question may be effectively raised by defendants as they have not shown any prejudice to themselves by reason of the application of said doctrine.

The final contention of defendants is that they are entitled to off-set against any liability as subscribers their claims as creditors of the exchange for money expended by them in defense and settlement of certain claims covered by their contracts of indemnity. They rely upon agreements made with the attorney-in-fact and a provision in two ex parte orders made by the court in the liquidation proceeding. Further facts should be stated in the consideration of this contention.

In 1930, Mr. Wren owned all the stock and was president of Automobile Underwriters, the attorney-in-fact corporation of the California Highway Indemnity Exchange. He was also vice-president and chairman of the executive committee of defendant Pacific Greyhound Lines, Inc., the operating company, and held various executive offices in Pacific Greyhound Corporation, the holding company, and in various subsidiaries of the operating company. The exchange was under examination by the insurance department in July, 1930, and on July 15, 1930, defendants canceled all their policies effective August 1, 1930. Mr. Wren received the report of the examination on August 29, 1930, and he discussed the insolvency and the question of assessment with the insurance department on September 3, 1930. He stated that "the stage companies would be willing to take up their share of the deficiency". The report showed the insolvency of the exchange as of May 31, 1930, and the insurance commissioner, on February 5, 1931, demanded that the deficiency be repaired within thirty days. In the meantime the defendant stage companies had discussed the question of possible set-off with the attorney-in-fact and in written set-off contracts, dated February 28, 1931, and March 1, 1931, the purported set-off agreements were made with the attorney-in-fact. It was recited therein that the exchange "is unable to pay all of the losses * * * in excess of the cash funds in the possession of the exchange and will in the near future levy an assessment". In one of the contracts, reference was made to the exchange's "insolvent condition" but this language was deleted from the contract some two months after the execution thereof. The insurance commissioner suspended the exchange's license on March 2, 1931, and thereafter the decree of liquidation was entered on June 19, 1931.

Thereafter defendants filed two petitions with the court in which the liquidation proceeding was pending. The petitions and the ex parte orders granted thereon were quite similar. One petition was entitled "Petition" while the other was entitled "Petition for Permission to Settle or Defend Certain Suits at Law Now Pending Against Petitioners". These petitions were filed primarily for the purpose expressed in the last-mentioned title as the contracts of indemnity prohibited the subscribers from voluntarily assuming the defense of any claim or incurring any expense. The exchange was insolvent and defendants had some 59 actions then pending against them. The petition set forth the facts and prayed for permission to have all files of the exchange relating to said claims made open to their inspection; for ratification of the acts done by defendants in assuming the defense of said claims; and for the right to proceed to settle, defend and satisfy said claims. No mention was made in said petitions of the above-mentioned set-off agreements. Defendants denied in said petitions that they were liable for assessment. They nevertheless asked in the prayers of said petitions that in the event that they were adjudged liable for assessment, they be permitted to off-set their expenditures on claims against their assessment liability. The ex parte orders, granted upon said petitions, followed closely the prayers of the petitions but made no mention of said set-off agreements. Said orders did provide, however, that "all payments * * * may be set-off by petitioners, *subject to the approval of the court as to reasonableness,* in the event that it shall be judicially determined that petitioners are liable for the levy of assessment * * *". (Italics ours.) Thereafter the court in the liquidation proceeding directed the bringing of this action in declaratory relief involving among other things the question of the right of set-off. In this action, defendants claimed the right to set-off all expenditures made by them against any assessment and asked for a declaration of that right.

The trial court here found "that said petitions were presented to said court, ex parte, and that the liquidator received no written notice of motion and was not present or represented at the time of the application for either of the orders; that the orders so made were not, and are not positive or mandatory in terms, but provide merely that expenditures so incurred 'may be set-off by petitioners subject to the approval of the court as to reasonableness'. And this court now finds that the allowance of any such set-off would be, and is unreasonable, inequitable and unjust toward other subscribers and that it would place the Pacific Greyhound Lines in the position of preferred creditors at the expense of all other subscribers, and would not be and is not, in accordance with the law applicable in the premises."

The trial court further found that defendants had expended money for said purposes and had filed creditors' claims therefor in the liquidation proceeding; that at the time the set-off agreements were made, the exchange was insolvent and was unable to pay losses and expenses; that the parties to said agreements anticipated the possibility of an assessment against the subscribers to make up the deficiency in assets; that the executive officers of defendants knew that the exchange was insolvent at the time of making said agreements; that the attorney-in-fact was without authority to make said agreements and that said agreements were made without the consent or approval of any other subscribers. The judgment entered by the trial court was to the effect that neither the subscribers in general nor defendants in particular were entitled to off-set any claims as creditors against their liability as insurers.

[12-14] Defendants do not attack the sufficiency of the evidence to support the trial court's findings relating to the subject of set-off and we are of the opinion that said findings support the portions of judgment of the trial court relating thereto. It has been held that where a mutual insurance company becomes insolvent, a policyholder is not entitled to set-off his claim as a creditor against his liability as an insurer. Lawrence v. Nelson, 21 N.Y. 158; Hillier v. Allegheny Mutual Ins. Co., 3 Pa. 470, 45 Am.Dec. 656; Stone v. Old Colony St. Ry. Co., 212 Mass. 459, 99 N.E. 218. We are of the opinion that the same principle should be applied in case of the insolvency of a reciprocal or interinsurance exchange. It seems entirely clear that the effect of the purported set-off agreement would be to grant to the defendants an advantage over other subscribers and creditors and that the trial court properly held that said purported contracts were in excess of the authority of the attorney-in-fact. Nor can the right of set-off be predicated upon the orders of the court in the liquidation proceeding for the portions of said orders relating to set-off were specifically made "subject to the approval of the court as to reasonableness". As above stated, the trial court found that "the allowance of any such set-off would be and is unreasonable, inequitable and unjust toward other subscribers".

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 121

## PROCTOR v. PYLE et al.

Civ. 6094.

District Court of Appeal, Third District, California.

May 29, 1939.

Hearing Denied July 27, 1939.

**1. Mortgages ⚷270**

Evidence sustained finding that note and purchase-money mortgage were purchased by assignee from mortgagee and that assignee thereby became owner and holder thereof, entitled to maintain foreclosure proceeding, and that payment to mortgagee was not made to extinguish indebtedness at request and in behalf of mortgagor; statute not applying. Civ.Code, § 1473.

**2. Bills and notes ⚷439**

When a note is paid after maturity by one who is comaker, a surety, or otherwise primarily liable for the obligation, indebtedness is extinguished, and suit based on that instrument may not thereafter be maintained.

**3. Bills and notes ⚷426**

When a note is paid after maturity by stranger in absence of evidence to contrary, it is presumed that transaction constitutes a purchase of the instrument and not an extinguishment of the obligation.

**4. Bills and notes ⚷426**

Whether payment of note by a stranger is purchase or extinguishment of obligation depends upon intention of the parties to be determined from facts of the particular case.

**5. Mortgages ⚷278**

Where purchaser purchased land for corporation and conveyed it to corporation subject to purchase-money mortgage which was not discharged when third party bought note and mortgage from mortgagee, corporation became liable for unpaid portion of purchase price to the extent of the value of the mortgaged land to which it held title.

**6. Mortgages ⚷278**

Where assignee of note and mortgage released part of land from mortgage and proportionate credit was made on note, and mortgagor conveyed remainder of land subject to mortgage to grantee, grantee was not harmed by release of part of land from mortgage.

---

Appeal from Superior Court, Sonoma County; Benjamin C. Jones, Judge.

Suit to foreclose a mortgage by George A. Proctor against Ira D. Pyle and Grouse Hill Land Company, a corporation. From a judgment for the plaintiff, last-named defendant appeals.

Affirmed.

George C. Faulkner, William T. Doyle, and Faulkner, Doyle & Sanford, all of San Francisco, for appellant.

Barrett & McConnell, Geary & Geary, and C. J. Tauzer, all of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, Grouse Hill Land Company, has appealed from a judgment foreclosing a mortgage of $9,500 on the "Dawson Ranch" in Sonoma county, consisting of 1938 acres of land, excepting therefrom 213.71 acres which were released from the mortgage lien.

The chief defenses to the foreclosure proceeding were the contentions that plaintiff was not the owner or holder of the note and mortgage, and that the note which was secured by the mortgage was previously paid and the indebtedness completely extinguished.

The transactions culminating in the execution of the note and mortgage are complicated.

The defendant, Ira D. Pyle, resides at Santa Rosa and is engaged in a real estate business. In 1924 he owned a large ranch in that county, called the "Cooper Ranch", subject to a mortgage of $23,000. With the agreement to purchase and operate this Cooper ranch as a hunting club, the Grouse Hill Land Company was incorporated in September, 1924. The directors and officers thereof were the defendant, Ira D. Pyle, Howard Ladd and Dr. B. J. Stickel. Pyle was the secretary, treasurer and manager of the company. The corporation claimed an equity in the land valued at the sum of $13,000, together with a further uncertain sum expended for improvements on the land. Contrary to the agreement, Pyle failed to deed or transfer the land to the corporation. In 1926, he informed the stockholders of the corporation that the holder of the $23,000 mortgage on the Cooper ranch threatened to foreclose it, but that he could sell their equities and advised investing the receipts thereof in an adjoining ranch of 1938 acres, called the

"Dawson Ranch", which the corporation could purchase for $9 an acre. This was agreed upon. Pyle sold the equities of the shareholders in the corporation to his brother C. C. Pyle and Red Grange for $13,000 in cash. The Cooper ranch transaction is not involved in the present mortgage foreclosure suit except that it furnishes evidence of the source from which a portion of the funds were derived with which the Dawson ranch was subsequently purchased.

The Dawson ranch was owned by three Dawson brothers. That 1938-acre tract was purchased by Ira D. Pyle for $9 an acre, aggregating the sum of $17,442. Mr. Pyle took title to that ranch in his own name, paying the grantors $7,942 in cash, and executing and delivering to them his personal note for the balance of the purchase price, to-wit: $9,500, due March 27, 1931, at 6 per cent interest payable semi-annually, secured by a mortgage on the entire ranch. Mr. Pyle failed to account to the Grouse Hill Land Company for $5,058 received from the sale of the Cooper ranch. He subsequently deeded to the corporation only 1724 acres of the Dawson ranch, retaining in his own name title to 213.71 acres thereof. The controversy over the title to this last-mentioned tract of land was not in issue nor was it determined by the court in this action. The shareholders in the corporation claim they did not discover the withholding by Mr. Pyle of the sum of $5,058 of the proceeds of sale of the Cooper ranch nor the retaining of the record title to the 213.71-acre tract of the Dawson ranch until December, 1930.

Mr. Dawson had no knowledge of any dispute between Pyle and the corporation regarding the proceeds derived from the sale of the Cooper ranch, or of the title to the 213.71-acre tract retained by him. Mr. Dawson dealt only with Mr. Pyle in the transaction involving the purchase of the note and mortgage. He had no knowledge of any interest claimed by the corporation.

The Pyle note for $9,500 matured March 27, 1931. Prior to its maturity, and on December 13, 1930, the note and mortgage were assigned to W. O. Dawson, one of the original owners thereof who thereby became the sole owner and holder of the instruments. In the first part of May, 1931, Dawson demanded of Pyle the immediate payment of the note threatening to foreclose the mortgage if he did not do so. Pyle then attempted to persuade the plaintiff, George A. Proctor, to purchase the note and mortgage. The plaintiff urged Marion Cooper to buy the note and mortgage. Cooper encouraged the plaintiff to believe that he might raise the money and procure the purchase of the note and mortgage. Arrangements were made to borrow the purchase price of the note, to-wit, $9,500, from Mrs. O. K. Cooper (now deceased), the wife of Marion Cooper. Pursuant to that agreement, Dawson, Marion Cooper and Pyle met in the office of Mr. Pyle to close the bargain May 25, 1931. At that time Marion Cooper executed and delivered to W. O. Dawson his personal check for $500 as part purchase price of the note and mortgage, with the agreement that upon the payment of the balance of the purchase price, to-wit, $9,000, Dawson would assign the note and mortgage to the plaintiff. Immediately after the $500 check was executed and delivered to Dawson, the parties went to the office of the Abstract Company in Santa Rosa, where an assignment of the mortgage was duly prepared and left to be delivered to the purchaser thereof upon completion of the transaction. The name of the assignee was, however, then left blank.

June 1, 1931, W. O. Dawson, Ira D. Pyle, the plaintiff George Proctor, and Marion Cooper again met in the abstract office and the purchase of the note and mortgage by the plaintiff was completed. Both instruments were then assigned by Dawson and delivered to the plaintiff. The $9,000 check for the balance of the purchase price had been previously drawn by F. M. Cooper, who is the same person called Marion Cooper, payable to his wife, Mrs. O. K. Cooper, from whom the money was borrowed. Mrs. Cooper drew the money from her savings account in the Exchange Bank and deposited it in her husband's account. The check was drawn by him in the name of his wife to preserve a history of the transaction. This check was endorsed by Mrs. O. K. Cooper and also by Ira D. Pyle. It was then placed on the counter in that abstract office for Mr. Dawson, who subsequently endorsed the check and cashed it the following day. Marion Cooper took the assignment to the Recorder's office and had it recorded. Mr. Pyle accompanied him on that occasion. Neither the note, mortgage nor assignment was delivered to Mr. Pyle. The transaction was conducted in the name of the plaintiff, George A. Proctor.

The loan from Mrs. O. K. Cooper was represented by a promissory note dated June 1, 1931, payable to her fifteen months after date with interest at the rate of 7 per cent per annum, payable quarterly. It was signed by Ira D. Pyle, George A. Proctor and her husband, Marion Cooper. We may reasonably assume Mr. Pyle signed that note to enable Mr. Proctor to borrow the money with which to purchase the note and mortgage so as to delay the foreclosure proceedings and particularly to secure a release of 213.71 acres from the mortgage lien for the benefit of the defendants. That purpose is clearly expressed in the agreement which was executed by the interested parties on the same date that the Cooper note was made.

On June 1, 1931, as a part of the transaction by means of which the note and mortgage were transferred to the plaintiff, Ira D. Pyle, as party of the first part, and George A. Proctor and Marion Cooper, as parties of the second part, joined in a written agreement with respect to the mortgaged property. It is our opinion this document confirms the findings of the trial court that the plaintiff became the purchaser of the note and mortgage from W. O. Dawson, and that he did not borrow the money for and in behalf of Ira D. Pyle, with which to satisfy the debt and extinguish the note and mortgage.

This written agreement clearly indicates that the parties thereto considered the plaintiff, George A. Proctor, the purchaser of the note and mortgage. He testified at the trial that he was the owner and holder of that note and mortgage in the following language: "Q. You are now the owner and holder of the note and mortgage described in the complaint? A. I am."

The purpose of the agreement was apparently to prevent an immediate foreclosure and to conditionally authorize Pyle to attempt to sell the 213.71-acre portion of the mortgaged Dawson ranch to which he retained title in his own name, provided the entire indebtedness of $9,500, together with interest and costs, was fully satisfied upon foreclosure sale. The agreement provides that immediately upon the execution and delivery to plaintiff of the assignment of the note and mortgage, he will release to Ira D. Pyle from the mortgage the 213.71 acre tract. That release was subsequently duly executed by the plaintiff. The court found that the release was made June 2, 1931, without the knowledge of the corporation. The agreement specifically provides that in the event that Mr. Pyle failed to sell the 213.71-acre tract within ninety days of the expiration of the period for redemption, that tract of land should still be held as security for the payment of the $9,500 note. The purchase price of that land was $9 an acre. As an equitable consideration, the trial court allowed the defendants in the foreclosure proceeding a credit of $9 an acre for the 213.71-acre tract of land, aggregating the sum of $1,923.39. The agreement also provides that the parties of the second part, Cooper and Proctor, will be held harmless on account thereof.

This suit for foreclosure of the mortgage was subsequently filed. The defendant, Ira D. Pyle, failed to appear or answer the complaint. His default was entered. The demurrer of the Grouse Hill Land Company was overruled, and its answer was filed, in which the essential allegations of the complaint were denied. It was affirmatively alleged that the plaintiff was not the owner or holder of the note and mortgage; that Mr. Proctor borrowed the money from Mrs. Cooper for the benefit of the defendant, Ira D. Pyle, and that the plaintiff paid the note and extinguished the indebtedness at the request and in behalf of Mr. Pyle. The corporation further charged that the transfer of the note and mortgage from Mr. Dawson to the plaintiff and the subsequent foreclosure proceedings were the result of fraud and conspiracy between the parties thereto.

The court adopted findings favorable to the plaintiff in every respect, determining that the $9,500 note and mortgage were executed by Ira D. Pyle, March 27, 1926, as a part of the purchase price of the Dawson ranch; that the plaintiff purchased from W. O. Dawson those instruments for the sum of $9,500; that they were duly assigned to him, and he thereby became the owner and holder thereof; that the Grouse Hill Land Company claims some right or title in the land secured by the mortgage, "but that said claim, title, interest, or lien of said defendant, if any it has, and the whole thereof, is subsequent, subject and subservient to the lien of said mortgage whereon plaintiff brings this action"; that said promissory note of $9,500 is due and unpaid, upon which a credit for the value of said 213.71 acres of land at $9 per acre, aggregating the sum of $1,923.39 should be allowed as of June 1, 1931, leaving an unpaid balance due on the note and mortgage of $7,576.61 with interest at 6 per cent per annum, payable semi-annually from the last-mentioned date, together with costs and counsel fees provided for in the mortgage. The respondent is not complaining of the credit which was allowed on account of the value of the released tract of 213.71 acres of land. The mortgage was not foreclosed as to that tract. It is not affected by the foreclosure proceedings. Any controversy between the corporation and Mr. Pyle regarding the title to that property may be determined in a proper action.

Upon the findings above referred to judgment was rendered against the defendants for only $7,576.61 with interest, costs and counsel fees. The decree of foreclosure directed the sale only of 1724 acres of the Dawson ranch to satisfy the judgment. It excludes the 213.71-acre tract released to Mr. Pyle. The judgment authorizes a deficiency judgment to be entered against Ira D. Pyle only. The corporation is not liable for any deficiency judgment. From the judgment and decree of foreclosure the Grouse Hill Land Company has appealed.

In spite of a serious conflict of evidence the proof is adequate to support the findings and judgment to the effect that the plaintiff, George A. Proctor, purchased the note and mortgage from W. O. Dawson and that he was the owner and holder thereof and therefore entitled to maintain the action of foreclosure. The evidence satisfactorily shows that Mr. Pyle took title to the 1938-acre Dawson ranch in his own name, and that he executed the note and mortgage March 27, 1931, in his own name to secure the unpaid portion of the purchase price of the land; that Mr. Pyle subsequently conveyed to the corporation, Grouse Hill Land Company 1724 acres of that land, subject to the mortgage; that in May, two months after the note matured, W. O. Dawson, the owner of the note, demanded payment thereof, which the defendants were unable to make; that Mr. Pyle sought to delay the foreclosure proceedings with the object of saving from foreclosure the 213.71-acre tract which was also mortgaged, but still remained in his name; that Mr. Pyle succeeded in interesting the plaintiff, George A. Proctor, in purchasing the note and mortgage, with an agreement that he would conditionally release from the mortgage the last-mentioned tract; that pursuant to that plan Mrs. O. K. Cooper loaned Mr. Proctor $9,500 with which he purchased the instruments.

By the terms of the written agreement it is provided that "upon the delivery of an assignment of the aforementioned mortgage to George A. Proctor, the said George A. Proctor shall forthwith release from said mortgage to the party of the first part 213.71 acres". The agreement then proceeds to specify the obligations imposed upon Mr. Pyle on account of that release after the mortgage on the balance of the ranch has been foreclosed. This agreement is absolutely inconsistent with appellant's theory of a payment of the note and satisfaction of the entire mortgage. It contemplates a foreclosure of the mortgage on the remaining 1724 acres of the ranch by the plaintiff. We therefore conclude that the note and mortgage were not paid and satisfied, but merely sold and transferred to the plaintiff who thereby became the owner and holder of the instrument.

In the present case the evidence indicates beyond doubt that George A. Proctor was not voluntarily paying the debt represented by the note and mortgage of Ira D. Pyle or the Grouse Hill Land Company. The agreement to release 213.71 acres of the tract refutes the theory that the transaction was intended as an extinguishment of the indebtedness. That instrument clearly contemplates foreclosure of the mortgage after Dawson parted with his title to the note. The agreement merely released conditionally a portion of the ranch in an effort to enable Mr. Pyle to try and save something from the wreck. The conduct of Mr. Pyle shows conclusively that he knew the transaction did not extinguish the debt nor satisfy the mortgage. He was present when the note and mortgage were purchased. He was the mortgagor, and perfectly familiar with real estate transactions. Section 2941 of the Civil Code authorized him to demand of the creditor, Dawson, at the time the debt was paid, an executed certificate of discharge of the obligation or a cancellation of the mortgage on the margin of the record thereof, but he failed to do so. On the contrary, he witnessed the delivery to Mr. Proctor of an absolute assignment of both the note and mortgage, and accompanied the assignee to the recorder's office to see that it was duly recorded. He was active in preserving the evidence of a continuing indebtedness. This conduct, and many other circumstances, support the findings of the court to the effect that it was not the intention of the parties to extinguish the indebtedness, but, upon the contrary, that they intended the transaction as a purchase of the note and mortgage by George A. Proctor and a preservation of the indebtedness secured by the mortgage which he might subsequently foreclose.

[1] Having determined that the facts of this case show the transaction constituted a purchase of the note and mortgage by the plaintiff, and not a payment and satisfaction of the obligation at the request and for the benefit of Mr. Pyle, it follows that the authorities cited and relied upon by the appellant, to the effect that the performance of an obligation "by a party whose duty it is to perform it, or by another person on his behalf" results in extinguishing the debt, are not in point. It is therefore useless to discuss those cases. They are distinguishable from the facts of this case as suggested.

It is true as declared in section 1473 of the Civil Code that: "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it."

But we have held that the facts do not show that the obligation was paid or discharged by Mr. Pyle, nor by Mr. Proctor on his behalf. On the contrary, we are of the opinion the evidence indicates that Mr. Proctor purchased the note and mortgage in his own behalf.

[2] It follows that when a note is paid after maturity by one who is a comaker, a surety or otherwise primarily liable for the obligation, the indebtedness is extinguished and a suit based on that instrument may not thereafter be maintained. Gordon v. Wansey, 21 Cal. 77; Harris v. King, 113 Cal.App. 357, 298 P. 100; Crystal v. Hutton, 1 Cal.App. 251, 81 P. 1115; Dodds v. Spring, 174 Cal. 412, 163 P. 351. A different rule, however, prevails when the note is fully paid by a stranger thereto who is not obligated by the terms of the instrument.

[3, 4] When a note is paid after maturity by a stranger thereto, in the absence of evidence to the contrary, it is presumed the transaction constitutes a purchase of the instrument and not an extinguishment of the obligation. The question as to whether the payment of the note by a stranger thereto is a purchase or an extinguishment of the obligation depends upon the intention of the parties, to be determined from the facts and circumstances of the particular case. The preceding principle of law, as declared in 8 Corpus Juris, 588, section 826, is supported by uniform authorities. It reads: "If a bill or a note is paid after its maturity by a stranger to the paper, it will in general be held to be a purchase and not a payment of the instrument. Whether it is a payment or a purchase is, however, a question of intention to be determined as a fact from the acts and declarations of the parties and from the surrounding circumstances."

In 8 American Jurisprudence, 478, section 830, the same principle is stated as follows:

"There is an important difference between the payment of a note and the purchase of it from the owner. Payment operates to discharge the instrument, but purchase continues it in circulation as a valid security against all parties: * * *

"Whether a transaction by which a negotiable instrument is taken up by one who is neither a party to the paper nor in any way bound for its payment constitutes a payment or a purchase is a question of intention—one of fact rather than of law—and must be settled by the evidence. It will ordinarily be considered a purchase in the absence of anything to show a contrary intention. A fortiori, if it appears that it was the intention to continue the existence of the note and not to cancel it, the transaction will be sustained as a purchase, at least where such intention is coupled with a power in the holder * * to sell and transfer the instrument. Thus, money paid by a third person to the holder of a note under an agreement that the note shall be assigned to the one making the payment is not a payment on the note."

The foregoing principle is uniformly supported by the California authorities. Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Welfare Investment Co. v. Stowell, 6 Cal.App.2d 444, 44 P.2d 625; Frank v. Brady, 8 Cal. 47. It is also supported by an unbroken line of authorities in other jurisdictions. Neer v. Neer, Mo.App., 80 S.W.2d 240; Citizens Bank & Trust Co. v. Cook, 9 La.App. 540, 121 So. 306; Briscol v. Am. So.

Trust Co., 176 Ark. 401, 4 S.W.2d 912; Moore & Brown v. Rea, 172 Ark. 1177, 288 S.W. 892; Federal Land Bank v. Neely, 110 W.Va. 433, 158 S.E. 659; McDonnell v. Burns, 8 Cir., 83 F. 866; Dodge v. Freedman's Savings & Trust Co., 93 U.S. 379, 23 L.Ed. 920; Baer v. Security Trust Co., 4 Cir., 32 F.2d 147.

The same principle of law was asserted in the case of Tolman v. Smith, 85 Cal. 280, 24 P. 743, 745, upon facts similar to those which exist in the present action. In that case Eunice W. Smith and her husband executed two mortgages on their Los Angeles property to William Reed, who appeared in the action as an intervener. One of the mortgages was executed to secure an unpaid portion of the purchase price of the land. The plaintiff, Tolman, also held a subsequent mortgage on the same land. The court said that "the two mortgages set up by the intervenor had priority over the plaintiff's mortgage". At the request of Mrs. Smith, after the maturity of the notes, the intervener, Reed, paid the owner and holder of the two notes the full amounts due thereon. The instruments were then assigned to Reed, who retained possession of them. They were not canceled. Mrs. Smith then executed and delivered to Reed a new mortgage for $8,500 to cover the amounts paid by him on the original debt together with an additional loan of $4,000.

This last note and mortgage matured at a date later than the time when the action of foreclosure was commenced. The Supreme Court held that the intervener's payment of the indebtedness at the request of the mortgagor did not extinguish the obligations but that it constituted a purchase of the notes and mortgages; that the execution of the subsequent note and mortgage amounted to a mere renewal of the former notes and not a cancellation of them, and that since the date of maturity was thereby extended, it had the effect only of suspending the time for foreclosure under the mortgage. Since the last note had not matured at the time the action was commenced, it was held the intervener was not then entitled to a decree of forclosure. Regarding the effect of paying the notes and mortgages at the request of the mortgagor, the court, however, said:

"What her [Mrs. Smith's] testimony shows is simply this: That at her request the intervenor paid to the holder of said two mortgages the sums due thereon; that they were not canceled, but were assigned to the intervenor, who retained them; and that Eunice W. Smith thereupon gave to him a new mortgage for $8,500, which was intended to cover the sums paid by him upon the old mortgages, and $4,000 additional, loaned by him to her. In other words, the old mortgages were retired, and a new one (having a longer period to run) substituted in their place; but there was no agreement or understanding that they should be considered satisfied, and they were not canceled, but were retained by the intervenor.

"This does not * * * show an extinguishment of the old mortgages. Even if the intervenor had not taken an assignment at the time he paid them off, a court of equity would, for purposes of justice, apply the principle of subrogation. Matzen v. Shaeffer, 65 Cal. 81, 3 P. 92; Gans v. Thieme, 93 N.Y. [225] 232; Yaple v. Stephens, 36 Kan. 680, 14 P. 222; Bacon v. Goodnow, 59 N.H. 415. And much more is he entitled to the benefit of those securities, in view of the fact that they were not canceled, but were assigned to him. If nothing else had occurred, it is clear that he would be entitled to enforce the old mortgages."

[5, 6] The Dawson ranch was purchased for the Grouse Hill Land Company and 1724 acres thereof were conveyed to the corporation, subject to the mortgage to secure the unpaid portion of the purchase price. The appellant is liable for that indebtedness, to the extent, at least, of the value of the mortgaged land to which it held title. The decree of foreclosure does not authorize a deficiency judgment to be entered against the corporation. The corporation was not harmed by a release of the 213.71-acre tract. The last-mentioned tract was not included in the foreclosure proceedings. If the corporation claims title or an interest in that tract it may be determined in a proper action.

The obligation was not extinguished by the transfer of the note and mortgage to George A. Proctor. The judgment is therefore affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 161

## PEOPLE v. BRESH.

Cr. 3193.

District Court of Appeal, Second District, Division 1, California.

June 1, 1939.

**1. Criminal law** 🔑1159(3)

Reviewing court, where there is conflicting evidence, will reverse conviction only when it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction.

**2. Criminal law** 🔑1159(6)

A reviewing court will reverse a conviction where the incriminatory circumstances relied upon to sustain conviction are equally compatible with innocence.

**3. Criminal law** 🔑1159(6)

Where jury by its finding of guilty rejects the hypothesis pointing to innocence and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, a reviewing court is bound by the finding of the jury.

**4. Infants** 🔑20

Evidence was sufficient to sustain conviction for violation of statute penalizing crimes against children. Pen.Code, § 288.

**5. Criminal law** 🔑1170½(2)

Where defendant allegedly lured small boys into his room by offering them coins, alleged error in sustaining objection to question asked defense witness, manager of apartment where defendant lived, as to whether boys ever asked him for money, was not so prejudicial as to warrant reversal of conviction, where before objection was made witness answered "yes" and answer was not stricken from record.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

William H. Bresh was convicted of crime against children as denounced by Pen.Code, § 288, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

Appellant was charged by an information containing two counts with violations of section 288 of the Penal Code. The jury returned a verdict of guilty as to count I and of not guilty as to count II, and from the judgment which was thereafter entered, this appeal is prosecuted on the grounds that the verdict is contrary to the evidence, and that the court erred in decisions on questions of law arising during the course of the trial.

The record discloses that on the morning of August 6, 1938, two boys, William, aged eleven years, and Fred, aged eight years, were playing on the porch of the apartment house where they lived. Appellant approached the boys and started talking to them about "coins". He told them he had "a coin in the room and he wanted me (William) to go with him to see it". Appellant and the two boys went to appellant's apartment where the crime charged in count I was committed upon the person of William. Shortly thereafter, William complained to his mother with reference to the treatment he had received at appellant's hands.

Appellant took the witness stand in his own defense and testified that the two boys accosted him on the street and asked him for money to go to a show; that they followed him to his room and returned on another occasion and begged him to give them money; that he saw nothing wrong in the boys being in his room with the door closed, and that he did not touch either boy while they were in his room.

Two defense witnesses testified that the boys were in appellant's room on two occasions and they heard a boy ask him for money, and that one of these witnesses, who was the manager of the apartment house where appellant lived, ordered the boys off the premises.

In connection with his first point, appellant urges that the testimony of the boy William is so improbable as not to warrant credence, and that the evidence presents a situation where the hypothesis of guilt is greatly out-weighed by the hypothesis of innocence.

[1-3] As is usual in this type of case, the evidence is highly conflicting, and the jury having rejected appellant's theory, this court is bound by such finding unless it appears that "upon no hypothesis whatever is there sufficient substantial evidence to sup-

port the conclusion reached in the court below". People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393. The rule of conflicting hypotheses is aptly stated by Mr. Justice Seawell in the case of People v. Perkins, 8 Cal.2d 502, 518, 66 P.2d 631, 639, to-wit: "Appellant presses on our attention the rule which frequently finds expression in our decisions to the effect that the circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion. In other words, where the incriminatory circumstances relied upon are equally compatible with innocence, a reviewing court will reverse a judgment of conviction, and a like application of that rule to this case, it is claimed, would impel a reversal of the judgment. The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.

[4] Appellant admitted that he had been previously convicted of a felony, and also admitted that he had been convicted of a charge involving boys for which he served ten months in the county jail. While there are some contradictions and slight inconsistencies in the testimony of the boy William, it cannot be said as a matter of law that his story of the occurrence complained of was so improbable as not to be worthy of belief.

[5] Appellant assigns as error the sustaining of an objection to the question asked of Mr. Garwood, the manager of the apartment house where appellant lived: "Have these boys ever asked you for money?" As a matter of fact, the question was asked and answered, "Yes, sir," before the objection thereto was interposed, and the answer was not thereafter stricken from the record; consequently, the jury undoubtedly considered the answer in arriving at its verdict. In any event, if any error existed by reason of that, it was not so prejudicial in character as to warrant a reversal of the judgment.

For the foregoing reasons, the order and judgment appealed from are affirmed.

We concur: DORAN, J.; WHITE, J.

---

## GRAY v. ROBINSON et al.

## JONES v. SAME.

## MYLAR v. SAME.

Civ. 2069.

District Court of Appeal, Fourth District, California.

June 2, 1939.

Rehearing Denied June 30, 1939.

Hearing Denied July 31, 1939.

**1. Appeal and error ⚷854(6)**

The District Court of Appeal is not concerned with the reasons given by a trial judge in granting motion for new trial if adequate grounds are specified in the motion and established by uncontradicted affidavits, particularly if court does not specifically exclude those specified grounds in the order.

**2. Appeal and error ⚷933(4)**

Where order granting new trial does not state that new trial was granted for insufficiency of evidence, it must be presumed on appeal that order was not made on that ground, unless the evidence is insufficient in law and without material conflict.

**3. Appeal and error ⚷854(6)**

On appeal from order granting motion for new trial, District Court of Appeal was not limited to consideration of grounds of misconduct of the jury and of irregularity in the proceedings recited in the order, but court could examine entire record to find support for order.

**4. New trial ⚷21, 28, 44(1)**

"Irregularity in proceedings" as basis for new trial refers to matters which may not be fully presented by objections during trial and which therefore must be shown by affidavit and includes irregularities of the court, jury, and adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. Code Civ.Proc. § 657, subd. 1.

[Ed. Note.—For other definitions of "Irregularity," see Words & Phrases.]

**5. New trial ⚷27**

Whether, under all circumstances, an irregularity for which new trial is sought has materially affected substantial rights and prevented a fair trial is addressed to trial court's discretion. Code Civ.Proc. § 657, subd. 1.

**6. New trial** ⚷21, 28, 44(1)

An overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct, may be regarded as an "irregularity" for which new trial may be granted. Code Civ.Proc. § 657, subd. 1.

**7. New trial** ⚷54

Where "irregularity in proceedings of the jury" as a ground for new trial is relied on, the moving party must show affirmatively that both he and his counsel were ignorant of the facts constituting the irregularity until rendition of verdict. Code Civ. Proc. § 657, subd. 1.

**8. New trial** ⚷26

A party may not remain quiet, taking his chances on a favorable verdict, and, after verdict against him, raise point of which he knew, and which he could have raised during progress of the trial, as basis for new trial. Code Civ.Proc. § 657, subd. 1.

**9. New trial** ⚷140(1), 143(1)

The facts constituting alleged misconduct of the jury and irregularity in proceedings as basis for new trial must be presented by affidavit, but affidavit of jurors cannot be accepted for purpose of impeaching the verdict other than to show that verdict was a chance verdict. Code Civ.Proc. § 657, subds. 1, 2; § 658.

**10. Appeal and error** ⚷933(5)

The truthfulness of affidavits offered in support of motion for new trial was assumed in support of order granting the motion. Code Civ.Proc. § 658.

**11. Appeal and error** ⚷933(5)

Where affidavit in support of motions for mistrial were referred to in affidavit in support of motion for new trial, and were incorporated therein by reference but were not before District Court of Appeal and were not referred to by appellants in their transcript on appeal from order granting motion for new trial, Court of Appeal could not presume error, insufficiency of the affidavit to support order granting motion for new trial, or that order appealed from had resulted in a miscarriage of justice. Code Civ.Proc. § 658.

**12. New trial** ⚷31

Where evidence was replete with inferences that defendant in automobile injury case carried insurance, to which evidence objection was duly made followed by motion to declare mistrial, motion for new trial could not be denied on ground that defendant had remained quiet with object of taking chance on a favorable verdict. Code Civ. Proc. § 657, subds. 1, 2.

**13. Appeal and error** ⚷977(3)
**New trial** ⚷6

A motion for new trial is largely addressed to court's legal discretion and court's action in granting new trial is conclusive in absence of clear and affirmative showing of gross, manifest, or unmistakable abuse of discretion. Code Civ.Proc. § 658.

**14. Appeal and error** ⚷933(1)
**New trial** ⚷6

The exercise of trial court's discretion in granting a motion for new trial is wide and every presumption is indulged in support of the court's action. Code Civ.Proc. § 658.

**15. Appeal and error** ⚷977(3)

A stronger showing is required to justify interference with an order granting than one denying a new trial, unless made on some legal proposition which may be considered in itself. Code Civ.Proc. § 658.

**16. New trial** ⚷29

Where evidence in automobile accident case contained inferences and insinuations, to which objection was made, that defendant carried insurance, court's exercise of discretion in granting motion for new trial was not abused. Code Civ.Proc. § 657, subds. 1, 2.

---

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Actions by K. Ethel Gray, Nellie G. Jones, and Elsie E. Mylar, against E. H. Robinson and others to recover damages resulting from an automobile accident. Verdicts were rendered in favor of plaintiffs. From order granting motions for new trial, plaintiffs appeal.

Affirmed.

Russell H. Pray, of Long Beach, W. K. Brown, of Missoula, Mont., and Edgar B. Hervey, of San Diego, for appellants.

Henry F. Walker, of Los Angeles, amicus curiae for appellants.

Sanders & LaMotte, of San Diego, for respondents.

GRIFFIN, Justice.

Appellants brought separate actions against respondents to recover damages resulting from an automobile accident. The actions were consolidated for trial and the jury was regularly sworn to try the issues. After a five weeks' trial, the jury rendered separate verdicts in favor of the appellants, upon which judgments were entered. Thereafter, respondents moved for a new trial in each action upon all the statutory grounds and in support thereof filed certain affidavits, including affidavits of three jurors who had dissented from the verdict. The order granting respondents' motions shows that they were granted upon the "ground of misconduct of the jury and the irregularity in the proceedings by which defendants were prevented from having a fair trial in that the juror, Mrs. Bruce Miles, possessed a state of mind showing prejudice against truck drivers". From the order of the court granting, in each case, the motions for new trial, this appeal is taken.

The affidavits of three jurors were received in evidence over the objection of appellants. Appellants now contend: (1) that the court erred in receiving the affidavits of the jurors in evidence; (2) that neither respondents nor their attorneys were ignorant of the facts set forth in the affidavits until after the rendition of the verdict; (3) that the court erred in granting the motions for a new trial.

Appellants and amicus curiae rely mainly on the theory that the order granting the new trial was limited to the sole question whether there had been prejudicial misconduct in that the juror Mrs. Miles possessed a state of mind showing prejudice against truck drivers, and contend that the only evidence by affidavit on that question arose from the three affidavits of the jurors which were erroneously admitted, citing Estate of Magerl, 201 Cal. 162, 168, 256 P. 204; Saltzman v. Sunset Telephone, etc. Co., 125 Cal. 501, 58 P. 169; Tierney v. Charles Nelson Co., 19 Cal.App.2d 34, 64 P.2d 1150; Kinney v. King, 47 Cal.App. 390, 190 P. 834; Borges v. Pacific Greyhound Lines, Inc., 10 Cal.App.2d 450, 51 P.2d 1146; Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 61 P.2d 931; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Young Mines Co. v. Citizens State Bank, 37 Ariz. 521, 296 P. 247.

For the reasons hereinafter expressed, we are unable to accept this limited interpretation of the order. In Boca, etc., R. Co. v. Sierra Valleys R. Co., 1905, 2 Cal. App. 546, 551, 84 P. 298, 300, the court held the general rule to be that "if there be any grounds upon which the order of the court can be upheld, the order will be sustained, irrespective of the particular ground given by the court, whether in an opinion or by a statement in the order itself. The exception to the rule is that if the trial court, in its order granting a new trial, excludes by direct language the ground of insufficiency of evidence, and the record shows that there was a conflict of evidence, the appellate court will accept the conclusion of the trial court, and not re-examine the evidence", citing cases. See, also, Thompson v. Felton, 54 Cal. 547; Scott v. Times-Mirror Company, 178 Cal. 688, 174 P. 312; Clark v. Torchiana, 19 Cal.App. 786, 127 P. 831; Chabot v. Tucker, 39 Cal. 434, at page 435; Shanklin v. Hall, 100 Cal. 26, 34 P. 636.

[1, 2] The reasons given by a trial judge in support of an order which sets forth the ground or grounds on which the motion is granted is no concern of this court where adequate grounds are specified in the motion and established by uncontradicted affidavits, and particularly so where the court has failed to specifically exclude in the order for a new trial those specified grounds. After a specification of the grounds, the statement of the reasons of the trial court cannot limit this court's inquiry. Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 67 Cal.App. 420, 227 P. 938; 1 Cal.Jur.Supp. 494, § 476; Condon v. Ansaldi, 203 Cal. 180, 263 P. 198; Moore v. Specialty Oil Tool Co., 128 Cal. App. 662, 666, 18 P.2d 82; Boness v. Helphinstine, 132 Cal.App. 677, 23 P.2d 420; Nally v. McDonald, 77 Cal. 284, 19 P. 418; Wurzburger v. Nellis, 165 Cal. 48, 50, 130 P. 1052; Churchill v. Flournoy, 127 Cal. 355, 59 P. 791. Of course, in the absence of a statement in the order that a new trial was granted on the ground of the insufficiency of the evidence to justify the verdict, it must be presumed on appeal that the order was not made on that ground unless it is insufficient in law and without material conflict. Breeze v. Southern Petro. Tank Line Co., 5 Cal.App.2d 507, 43 P.2d 584; Leaper v. Gandy, 22 Cal.App.2d 475, 71 P.2d 303; Tweedale v. Barnett, 172 Cal. 271, 274, 156 P. 483; Tunmore v. McLeish, 45 Cal.App. 266, 187 P. 443.

[3] In Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124, it was said: "The proposition of the appellant that this

court is limited upon this appeal to a consideration of the grounds specified in the order granting the new trial is untenable. A party has the right to move for a new trial upon any or all of the grounds permitted by the statute; and, if the record on which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record. The action of the court below is limited to granting or refusing a new trial, and, except in those cases in which it is justified in limiting the new trial to one or more designated issues, the effect of an order granting a new trial is to place the cause in the position it held before any trial had been had. * * * A motion for a new trial is a proceeding in the nature of a new action, wherein the statement or bill of exceptions corresponds to the complaint, and the specifications of error to a demurrer thereto, and the action of the trial court in sustaining the motion is to be treated on the same principles. If there be any grounds upon which its action can be upheld, the order will be sustained, irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself." See, also, River Farms Co. of California v. Superior Court of the City and County of San Francisco, 131 Cal.App. 365, 21 P.2d 643; Sherwood v. Kyle, 125 Cal. 652, 655, 58 P. 270; Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 165 P. 12; Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712; Steil v. Sun Insurance Office, 171 Cal. 795, 155 P. 72, and cases cited; Smith v. Royer, 181 Cal. 165, 183 P. 660; La Rue v. Barr, 208 Cal. 493, 282 P. 10; Smith v. Mitchell, 64 Cal.App. 463, 221 P. 964; Clark v. Torchiana, supra.

It should be noted that section 657 of the Code of Civil Procedure provides in part as follows:

"The verdict may be vacated * * * and a new * * * trial granted * * * on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

"1. Irregularity in proceedings. Irregularity in proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

"2. Misconduct of jury. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors."

[4] The court by its order granted the motions on the grounds set forth in subdivision (2), namely, "misconduct of the jury", and as set forth in subdivision (1) "irregularity in proceedings", with some attempted limitation, i. e., "that the juror, Mrs. Bruce Miles, possessed a state of mind showing prejudice against truck drivers". Subdivision (1) refers to matters which may not be fully presented by objections taken during the progress of the trial and which therefore must be shown by affidavit. Woods v. Jensen, 130 Cal. 200, 62 P. 473. This subdivision refers to irregularities of the court, jury, and adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

[5, 6] We are familiar with the rule that the question whether, under all the circumstances, an irregularity has materially affected substantial rights and prevented a fair trial is addressed to the discretion of the trial court which, having heard and seen the witness and having knowledge of circumstances which may not be produced in the record, is in better position than the appellate court to determine the effect. No accurate classification of such irregularities can be made, but it is said that an overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct, may be regarded as an irregularity. The meaning of "irregularity in the proceedings of the jury" as a ground for new trial has not been judicially determined nor does the intention of the legislature in enacting such provision seem clear, in view of the subsequent provision of the act by which "misconduct of the jury" is also made a ground for a new trial.

[7, 8] It also seems to be the rule that where such irregularity is relied upon, the moving party must show affirmatively that

both he and his counsel were ignorant of the facts constituting the irregularity charged until the rendition of the verdict, since it is settled that a party may not remain quiet, taking his chances upon a favorable verdict, and, after a verdict against him, raise a point of which he knew and could have raised during the progress of the trial. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 P. 92.

[9] In support of the order of the trial court, we may then properly assume that misconduct of the jury and irregularity in the proceedings were grounds on which the new trial was granted. This must be presented by affidavit. Sec. 658, Code Civ. Proc. The rule is well established that affidavits of jurors cannot be accepted for the purpose of impeaching the verdict other than to show that the verdict was a chance verdict. However, in Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407, the court held that the uncontradicted affidavits of jurors were admissible in reference to the statement of the jurors on examination under voir dire relating to facts which had their origin before empanelment and continued until discharge of the jury, and ordered a new trial granted.

[10] We only consider it necessary to resort to the uncontradicted affidavits, exclusive of those presented by the jurors, to uphold the order of the trial court. After an examination of the affidavits, and assuming the truthfulness thereof in support of the order, it is self-evident, without further argument here, that the order should be affirmed without examining other grounds presented.

One of the attorneys for respondents recites in his affidavit in support of the motion for new trial that he was present in the court-room during most of the time the actions were being tried; "that on the trial of said action evidence was received indicating that defendants were insured, and affidavits were filed in support of the motion for mistrial, which affidavits are by this reference thereto incorporated herein and made a part hereof, and that thereafter additional matters were brought before the jury showing that said parties were insured, and on each such occasion the said parties moved the court for a mistrial on the grounds which were shown in the said affidavits, which motion was denied and an exception made. * * * That all of the above matters constitute misconduct and rulings of the court in the exercise of his discretion which prevented the parties represented by affiant from having a fair trial."

[11] The affidavits referred to filed in support of the motions for mistrial, which affidavits were by reference incorporated in the affidavit for new trial and made a part thereof, are not before this court and no reference thereto has been made by appellants in their transcript on appeal. We therefore cannot presume error, insufficiency of the affidavits to support the order of the court granting the motions for new trial, or that the order appealed from has resulted in a miscarriage of justice. Doak v. Bruson, 152 Cal. 17, 91 P. 1001.

[12] The evidence before the trial court, according to the motion for diminution of the record, was replete with inferences and insinuations that respondent carried insurance. To this evidence objection was duly made and this objection was followed by a motion to declare a mistrial.

It appears from the affidavit that counsel for respondents did all he could do to call to the attention of the court the irregularities in the proceedings by which the respondents were prevented from having a fair trial. It cannot be said fairly, that the parties remained quiet and preferred to take their chance on a favorable verdict and that after a verdict against them they then for the first time raised a point of which they knew and could have raised during the progress of the trial, particularly as to the affidavit pertaining to the "irregularities in the proceedings in which respondents were prevented from having a fair trial." The prompt action of respondents in this regard removed the case from the rule laid down in Sherwin v. Southern Pacific Co., supra; Merralls v. Southern Pacific Co., 182 Cal. 19, 186 P. 778, and Piercy v. Piercy, 149 Cal. 163, 86 P. 507.

[13-15] In analyzing the authorities, we are mindful of and must be guided by the general rule, i. e., that a motion for a new trial is to a large extent addressed to the legal discretion of the court to which the application is made and that its action in granting a new trial is conclusive and will not be disturbed in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. Such discretion is very wide and every presumption is indulged in support

of the action of the court in passing upon the motion (Whitfield v. Debrincat, 18 Cal. App.2d 730, 64 P.2d 960) and a stronger showing is required to justify interference with an order granting than one denying a new trial, unless made upon some legal proposition which may be considered in itself; and every presumption is indulged in support of the court in passing upon the motion. Hole v. Takekawa, 165 Cal. 372, 132 P. 445; Cooney v. Furlong, 66 Cal. 520, 6 P. 388; Skinner v. Horn, 144 Cal. 278, 77 P. 904; 20 Cal.Jur., § 13, p. 27.

In Whitfield v. Debrincat, supra, this same general rule was applied where the motion for new trial was made solely on the ground of "surprise occurring at the trial, which ordinary prudence could not have guarded against".

[16] We perceive no evidence from the record before us in the instant case supporting the contention of appellants that the trial court abused its discretion in granting the motion for a new trial. The court may well have concluded that the claimed irregularities in the proceedings, misconduct of the jurors, counsel, and the court, were such that the only way to obviate any resulting prejudice to the rights of respondents was to grant a new trial.

The order from which this appeal is perfected is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

## PEOPLE v. POCIASK. *

**Cr. 3187.**

District Court of Appeal, Second District, Division 1, California.

May 31, 1939.

Hearing Granted June 29, 1939.

**1. Statutes 🔑178**

The language of Civil Code provision that words and phrases which have a technical or peculiar meaning or definition in law are to be construed accordingly and that other words and phrases are construed according to context and approved usage, is applicable to the Penal Code. Civ.Code, § 13; Pen.Code, §§ 7, 20.

**2. Negligence 🔑144**

The words "criminal negligence" as used in the Penal Code have the signification attached to them by the defining provision of the Penal Code unless otherwise apparent from the context, since at the time the Penal Code was adopted the words "criminal negligence" had acquired no technical or peculiar meaning in law. Pen.Code, §§ 7, 20; Civ.Code, §§ 13, 17.

[Ed. Note.—For other definitions of "Criminal Negligence," see Words & Phrases.]

**3. Negligence 🔑144**

Generally, actionable "negligence" is a violation of private rights and injuries for which there is a remedy only by civil action, but the Legislature can declare "negligence" the basis and subject-matter of a crime and when so declared such "negligence" becomes "criminal negligence."

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

**4. Homicide 🔑34**

An act "without due caution and circumspection," as used in Penal Code provision defining involuntary manslaughter, need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as "culpable," but the word "culpable" is not an apt description of the idea intended to be conveyed by the words "without due caution and circumspection." Pen.Code, § 192.

[Ed. Note.—For other definitions of "Culpable" and "Without Due Caution and Circumspection," see Words & Phrases.]

**5. Homicide 🔑34**

The phrase "without due caution and circumspection" as used in the Penal Code provision defining involuntary manslaughter is the equivalent of and is in harmony with the word "negligently" as defined by the Penal Code. Pen. Code, § 7, subd. 2; § 192.

[Ed. Note.—For other definitions of "Negligently," see Words & Phrases.]

**6. Negligence 🔑144**

The words "criminal negligence" as used in the Penal Code have no special meaning involving a special degree of negligence, but are subject to the Penal Code provision defining "negligence" as a want of such attention to the nature or probable consequences of an act or omission as a prudent man ordinarily bestows in acting in his own concerns. Pen.Code, § 7, subd. 2; § 20.

---

*For subsequent opinion see 96 P.2d 788.

**7. Automobiles ⚷344, 356**

In prosecution for "negligent homicide" under the Vehicle Code, the degree of negligence is immaterial and whether the acts or omissions charged to accused constitute negligence is for jury. St.1935, p. 173, § 500; Pen.Code, § 7, subd. 2; § 20.

[Ed. Note.—For other definitions of "Negligent Homicide," see Words & Phrases.]

**8. Automobiles ⚷357**

In prosecution for "negligent homicide" under Vehicle Code, instruction which adopted the Penal Code's definition of "negligence" as a want of such attention to the nature or probable consequences of an act or omission as a prudent man ordinarily bestows in acting in his own concerns, was proper. St. 1935, p. 173, § 500; Pen.Code, § 7, subd. 2; § 20.

**9. Automobiles ⚷357**

In prosecution for "negligent homicide" under Vehicle Code, requested instructions defining criminal negligence as involving a culpably wanton, flagrant or reckless disregard of others or willful indifference were properly refused. St. 1935, p. 173, § 500; Pen.Code, § 7, subd. 2; § 20.

**10. Criminal law ⚷829(3)**

In prosecution for negligent homicide under Vehicle Code, refusal to give requested instruction defining excusable homicide with reference to statutes, the substance of which was covered by the definition of negligence already given was not prejudicial error. St.1935, p. 173, § 500; Pen.Code, § 7, subd. 2; § 26, subd. 6; § 195, subd. 1; § 20.

**11. Automobiles ⚷344**

"Negligence" within meaning of Vehicle Code provision penalizing "negligent homicide" is the same as "culpable negligence" as used in Penal Code provision relating to persons capable of committing crimes. St. 1935, p. 173, § 500; Pen.Code, § 26, subd. 6.

[Ed. Note.—For other definitions of "Culpable Negligence," see Words & Phrases.]

**12. Negligence ⚷144**

The word "culpable" as used in Penal Code provision relating to persons capable of committing crimes means "blameworthy." Pen.Code, § 26, subd. 6.

[Ed. Note.—For other definitions of "Blameworthy," see Words & Phrases.]

**13. Automobiles ⚷346**

Contributory negligence of the victim is not a defense to a prosecution for "negligent homicide" under Vehicle Code. St.1935, p. 173, § 500.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Alexander A. Pociask was convicted of negligent homicide as defined by the Vehicle Code, St.1935, p. 173, § 500, and from the judgment of conviction and order denying a new trial, he appeals.

Affirmed.

Ward Sullivan and Thornwell Rogers, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

DORAN, Justice.

Defendant and appellant was found guilty by a jury of negligent homicide as defined by section 500 of the Vehicle Code, St.1935, p. 173, and appeals from the judgment as well as from the order denying a motion for a new trial.

As a major contention on appeal it is urged by appellant that the trial court erred in refusing to give defendant's proposed instruction defining criminal negligence, but instead, in defining negligence, adopted the definition thereof contained in subdivision 2 of section 7, of the Penal Code, which is as follows: "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

Section 20 of the Penal Code provides as follows: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence," in which connection it is argued by appellant that, by construction, negligence, in order to justify a conviction under section 500 of the Vehicle Code, must constitute criminal negligence as contemplated by section 20 of the Penal Code. The refused instructions in part were as follows: "Criminal negligence in degree goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable. In other words, in order to constitute criminal negligence there must enter into the act some wantonness or flagrant or reckless disregard of the safety of others, or wilful indifference, and if no one of these elements enters into the act the person charged cannot be held guilty of criminal negligence. * * * It is such negligence as would amount to a flagrant and reckless disregard of defendant's own safety and amount to a wilful indifference to the injuries liable to follow. In other words, criminal negligence is the doing of a lawful act in a culpably reckless manner."

Appellant relies upon the authority of People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978, and People v. Driggs, 111 Cal. App. 42, 295 P. 51, 53. In the Driggs case, after referring to the definition of negligence as found in section 7 of the Penal Code, the court continues: "Though found in the Penal Code, this definition of 'negligence' is only of an act which fixes civil liability; it is the definition of the kind of act which fixes responsibility upon, for instance, drivers of automobiles, where no criminal element whatever is involved. In order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence." The opinion in the Hurley case quotes at length from the Driggs opinion and arrives at the same conclusion.

In the Driggs case the defendant was charged with assault with a deadly weapon with intent to commit murder, and in the Hurley case the defendant was charged with manslaughter.

Whether the above-mentioned conclusion with regard to the meaning and application of the term "criminal negligence" is warranted, affords an opportunity for a distinct difference of opinion. That the decisions of many states, as pointed out in the Hurley case, are in accord with the conclusions therein reached, there can be no question. And in California such a meaning has been suggested, in obiter dictum, in Grossetti v. Sweasey, 176 Cal. 793, at page 800, 169 P. 687, 689, wherein the court, by way of example, observed in connection with the subject there considered that, "It may be legitimate argument to call a jury's attention to the fact that very gross negligence may take the place of specific intent in a prosecution for certain crime. The term 'criminal negligence' is used to designate that sort of negligence. Pen. Code, § 20." Nevertheless whether such a doctrine is applicable in California, is doubtful.

[1] The law is well settled, and there can be no dispute, as to the meaning of the word "intent" as used in the criminal law in general, and as used in section 20 of the Penal Code in particular. (7 Cal.Jur., p. 850 et seq.) However, in order to determine the meaning to be given to the combination of words "criminal negligence", as used in the section, requires extended consideration. Primarily, it should be noted that section 7 of the Penal Code provides that "The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context." Then follows the definition of "negligence" as above set forth. Section 13 of the Civil Code is as follows: "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition." Because the foregoing language appears in the Civil Code, it is no less applicable to the provisions of the Penal Code. Therefore, unless the words "criminal negligence" were technical words or had "acquired a peculiar and appropriate meaning in law" at the time section 20 of the Penal Code was adopted by the legislature, they are to be "construed according to the context and the approved usage of the language" and, unless otherwise apparent from the context, the word "negligence" must be given the meaning as defined by the legislature.

At the outset it should be noted that section 20 of the Penal Code was adopted by the legislature in 1872. It follows almost exactly the phraseology of the same provision adopted by the legislature in 1850. (Stats. of Calif., 1850, chap. 99, p. 229.) In that connection it becomes important to ascertain the accepted meaning of the words "criminal negligence" at the time the code provision was adopted. A comprehensive research among scores of volumes reveals the following: The phrase is not to be found in Blackstone, who appears to have originated the combination of words "without due caution and circumspection". It is not to be found in any of the early text books on criminal law. The words "criminal negligence" are not included as a compound word in any accredited dictionary. The first edition of Bishop's Criminal Law appeared in 1856. The eighth edition appeared in 1892. Even in this last edition there is no mention of the term "criminal negligence". Bishop refers to the subject as follows: "Carelessness,—when producing certain evil results, is, we shall by-and-by see, criminal. But it follows from the doctrine of this chapter, and from the reason of the thing, that there may be a carelessness so slight as not to be of account in the criminal law. In principle, the line distinguishing the less degree from the greater is not quite easy to find, and when we seek for it in authority it there appears variable and uncertain." And, "Carelessness Criminal.—There is little distinction except in degree between a will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal, and within limits supplies the place of the affirmative criminal intent." (Bishop's New Criminal Law, vol. 1, pp. 119 and 188.) Other early text writers expound the same doctrine in substantially the same manner and without the use of the term "criminal negligence". The only reference in the American Digest, Century Edition (which covers the period from 1658 to 1896), and the American Digest, First Decennial Edition (which covers the period from 1897 to 1906), to the term "criminal negligence" appears in volume 14 of the former at page 641, wherein, under the heading "Criminal Intent and Malice", follows the simple statement that "To constitute a crime, the criminal act must be accompanied by a criminal intent or criminal negligence"; however, no decision prior to 1872 cited in the footnote makes any reference to the words "criminal negligence". Based on the research in connection with the preparation of the within opinion, it appears that the term as approved in People v. Hurley, supra, was first used in 1891 in Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143, 49 N.W. 1144. It is used in the same manner in State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A., N.S., 458, in 1910, and again in Schultz v. State, 89 Neb. 34, 130 N.W. 972, 33 L.R.A., N.S., 403, Ann.Cas.1912C, 495, in 1911. The foregoing authorities, among others, are relied upon in People v. Hurley, supra.

The use of the term "criminal negligence" as defined in the cases just cited, has since become somewhat extensive. Volume 2, First Series, of Words and Phrases Judicially Defined (published in 1904), includes the definition of "Criminal Negligence", citing Omaha & R. V. R. Co. v. Chollette, supra, for authority. Volume 1 of Words and Phrases, second series, (published in 1914), page 1153 defines "Criminal Negligence", citing for authority the Omaha & R. V. R. Co. v. Chollette case, supra, and as well State v. Goetz, supra, and Schultz v. State, supra.

[2] It is at once evident, therefore, that at the time section 20 of the Penal Code was adopted in 1872, the words "criminal negligence" had acquired no peculiar meaning in the law, nor could they have been regarded as among "technical words" to be construed according to a "peculiar meaning in law", hence they are to be "construed according to the context and the approved usage of the language" at the time the section was adopted by the legislature. Such is the clear mandate of section 13 of the Civil Code, and, "unless otherwise apparent from the context", they are to be given the "signification attached to them" in the section, if the mandate of section 7 of the Penal Code is to be respected.

It should be emphasized at this point that at the time the codes were adopted in 1872 the Civil Code contained a provision defining the degrees of negligence, which provision was repealed the following year. See sec. 17, Civ.Code, and Walther v. Southern Pacific Co., 159 Cal. 769, at page 775, 116 P. 51, 37 L.R.A.,N.S., 235.

It is also noteworthy that the term "criminal negligence" is not defined, nor is there anything in the statute law of California that indicates an intention to give to the words "criminal negligence" any different meaning as used in section 20 of the Penal

Code than their meaning as used elsewhere according to the "approved usage of the language" at that time.

[3] Negligence assumes countless forms and occurs in all walks of life and human endeavor. Generally speaking, when actionable, it is a violation of private rights and injuries for which there is a remedy only by civil action. That the legislature has the power to declare negligence the basis and subject-matter of a crime there can be no question. When so declared such negligence becomes criminal. By the simple process, and manifestly relying upon the "approved usage of the language", by modifying the noun "negligence" with the adjective "criminal", the legislature clearly intended to and did establish the doctrine that negligence should not be a crime unless declared so by statute, and when so declared becomes the equivalent of the "intent" common to other offenses.

There are no limitations or restrictions on the use of a language, and hence there can be no criticism of those who have elected to use the word "criminal" for the purpose of denoting degree and as a synonym of such words as: gross, wanton, flagrant, reckless, and other superlatives similar in meaning. But its use for such purpose can scarcely be justified when the derivation of the word "criminal" is taken into account. In that connection Ruling Case Law sums up the subject as follows: "There has been considerable controversy as to whether the concept embodied by the term 'negligence' is susceptible of subdivision, some courts have insisted that negligence exists in degrees, described as 'slight', 'ordinary', and 'gross', and that a cause of action sounding in one degree is different than a cause sounding in another degree. This theory appears to have been introduced into the common law from some of the commentators on Roman law; and, though disapproved by the general trend of modern jurisprudence, is adhered to with firmness by the courts of some jurisdictions. By such definite system, resting on a broad, sensible foundation and rising harmoniously to the finality of minor details, enabling courts to be guided, in the main, by principles instead of mere precedents, justice is capable of being administered on the basis of law as a science, instead of its drifting into confusion and taking on the cast of results of arbitration by courts. On the other hand, the Supreme Court of the United States has said: 'It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation.' (*Footnote: The Steamboat New World v. King [16 How. 469], 14 L.Ed. [1019] 1021.) Whatever phraseology may be adopted to describe the defendant's conduct, the thought sought to be expressed is absence of the care that was necessary under the circumstances. The term 'negligence' unqualified covers all those shades of inadvertence which range between deliberate intention on the one hand and total absence of responsible consciousness on the other. In any case it is for the jury to determine the degree of the defendant's responsibility." (Vol. 20, R.C.L., p. 21.)

[4, 5] In connection with the subject here considered it should be noted that in the case of People v. Seiler, 57 Cal.App. 195, 207 P. 396, 399, it was sought to define the phrase "without due caution and circumspection" as the equivalent of criminal negligence as later defined in the Hurley case, supra. In denying the petition for a hearing, the Supreme Court of California took occasion to point out that "The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word 'culpable' is not an apt description of the idea intended to be conveyed by the words 'due caution and circumspection.'" People v. Seiler, supra, 57 Cal.App. at page 201, 207 P. at page 399. In that regard it is appropriate to further observe that the phrase "without due caution and circumspection" as used in section 192 of the Penal Code is the equivalent of the word "negligently" and is in perfect harmony with that word as defined in section 7 of the Penal Code. The unlawful killing of a human being without malice resulting from the commission of a lawful act which might produce death, without due caution and circumspection, is declared to be a

crime. A lack of due caution and circumspection, or in other words, negligence, is an element of the offense. Such negligence is therefore criminal, and serves as another example of "criminal negligence" as contemplated by section 20 of the Penal Code.

[6, 7] Manifestly, in the light of the foregoing the word criminal, at the time section 20 of the Penal Code was adopted, had not such "signification" as contended for by appellant. For the courts to give it the quality of degree would, in effect, restore by judicial decision what the legislature has rejected by appropriate legislation. Therefore, with regard to negligence, unless the legislature by statute declares a certain degree to be a pertinent part and phase of offenses generally, or of some offense in particular, it must be assumed that the matter of degree was purposely disregarded, and therefore not intended to be incorporated as an element of the offense. Hence in a prosecution for the offense set forth in section 500 of the Vehicle Code, the degree of negligence is immaterial, and whether the acts or omissions charged to the defendant on trial constitute negligence, is for the jury to determine.

[8, 9] On the foregoing subject the jury was correctly instructed, and appellant's proposed instruction was properly refused.

[10–12] It is next contended by appellant that the court committed prejudicial error in refusing to give defendant's proposed instruction defining excusable homicide. The proposed instruction was based on subdivision 1 of section 195, and subdivision 6 of section 26, of the Penal Code. It was objectionable and properly refused for the reason that in the proposed instruction the words "criminal negligence" were used according to the theory herein contended for by appellant and herein before considered. The instruction was properly refused, also, on other grounds. Section 26 of the Penal Code provides that "All persons are capable of committing crimes except those. * * * Six. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Negligence, which causes the death of a person within the meaning and application of section 500 of the Vehicle Code, is culpable negligence as contemplated by section 26 of the Penal Code. "Culpable" means "blameworthy". Manifestly, to instruct the jury either in substance, or literally, as to the provisions of section 26, would serve no purpose.

Subdivision 1 of section 195 of the Penal Code, which declares that "Homicide is excusable * * * when committed by accident and misfortune * * * or in doing any other lawful act by lawful means, with usual and ordinary caution" is merely a provision which serves to complete the definition of negligence. Although such an instruction, couched in the language of the statute, can do no harm in the sense that it would tend to confuse, nevertheless the failure of the court to give the instruction, particularly in the form and substance offered, cannot be successfully urged as prejudicial error.

[13] Finally, it is contended that the court erred in instructing the jury in effect that contributory negligence constituted no defense. "According to the clear weight of authority, the rule of law concerning contributory negligence by the injured person as a defense in a civil action for damages for personal injuries is not applicable to a prosecution for manslaughter as the result of negligence." (13 R.C.L., p. 859.) The foregoing rule has been followed in California. People v. McKee, 80 Cal.App. 200, at page 205, 251 P. 675; People v. Marconi, 118 Cal.App. 683, at page 687, 5 P.2d 974. And the same may be said with regard to a prosecution for the offense of which the appellant herein was charged.

For the foregoing reasons the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

## BECKETT v. CITY OF PARIS DRY GOODS CO. (two cases). *

Civ. 10737.

District Court of Appeal, First District, Division 1, California.

June 7, 1939.

Hearing Granted Aug. 3, 1939.

**1. Licenses ⇨44(2)**

In determining whether a written agreement, whereby department store agreed to furnish an optometrist certain space in its store, was a lease or a license, the contract being lawful, the intention of the parties must be ascertained from the written agreement. Civ.Code, §§ 1636, 1639, 1643.

**2. Licenses ⇨44(2)**

The use of the words "cannot assign this lease," "tenantable," and "space demised," in a contract whereby a corporation owning a department store agreed to designate certain space in the store to be used for optometry department, was a circumstance which, while indicative of the intention of the parties, was not entirely determinative of the question of whether the instrument was a license or a lease.

**3. Licenses ⇨44(2)**

The supervisory powers reserved and the restrictions imposed in a contract whereby a department store agreed to furnish certain space for an optometrical department, with the provision that the department would be operated under the regulations of the store, and that the daily receipts would be turned over to the store's cashier, were indicative of the intention of the parties, but they were not controlling as to whether agreement was a license or a lease.

**4. Licenses ⇨44(2)**

If an agreement for the rental of space gives to the parties occupying the designated space exclusive possession, it is a "lease"; but, if the occupant of the space has, under the agreement, only a privilege to occupy, the agreement is a "license."

[Ed. Note.—For other definitions of "Lease" and "License," see Words & Phrases.]

**5. Licenses ⇨44(2), 59**

An agreement, whereby a department store contracted to designate certain space for an optometry department, and reserved right to relocate, enlarge, or decrease the amount of space, was a "license" which was revocable by the licensor on breach of a condition by the licensee and not a "lease."

**6. Licenses ⇨59**

An agreement, granting an optometrist the privilege of establishing an optometrical department in a store, which did not give him an exclusive privilege to the possession of the property under a lease contract, could be terminated by the store for an infraction of the agreement by optometrist without being held liable in damages.

**7. Appeal and error ⇨790(3)**

A plaintiff's appeal from a judgment assessing damages for unlawful eviction was moot and was required to be dismissed, where reviewing court's determination that plaintiff did not have a lease precluded plaintiff from recovering damages for the eviction.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for damages for unlawful eviction by Lawrence G. Beckett against the City of Paris Dry Goods Company. Judgment for the plaintiff, and the plaintiff appeals from that part of the judgment wherein trial court failed to grant certain items of damage, and the defendant appeals from the whole of the judgment.

Judgment reversed in part and affirmed in part; plaintiff's appeal dismissed.

Daniel R. Shoemaker and Dean Cunha, all of San Francisco, for City of Paris Dry Goods Co.

Dinkelspiel & Dinkelspiel and David K. Lener, all of San Francisco, for Beckett.

WARD, Justice.

Plaintiff and defendant have each appealed from a judgment entered in the above-entitled cause wherein plaintiff, Dr. Lawrence G. Beckett, recovered damages against the City of Paris Dry Goods Company, a corporation, for unlawful eviction, and a further amount of $11.03 as a balance of account due him. Defendant's appeal is from the whole of the judgment; plaintiff's appeal is from that part of the judgment wherein and whereby the trial court refused to grant certain items of damage.

The plaintiff, Lawrence C. Beckett, an optometrist, who will be referred to hereinafter for the purpose of convenience as

---

*For subsequent opinion see 96 P.2d 122.

Dr. Beckett, entered into a three-year agreement with the defendant corporation (for the same reason hereinafter referred to as the City of Paris), to operate, manage and direct a first-class optometry concession in the defendant's department store. The space to be occupied was to be designated by the City of Paris. The department was to be operated under its rules and regulations, and the proceeds of the business were to be delivered at the close of each day to its cashier. On the fifteenth day of each month a statement was to be rendered by the City of Paris to Dr. Beckett showing sales, offsetting advertising and other costs, and if a balance appeared in favor of Dr. Beckett a check in such amount was to accompany the statement. The ninth paragraph of the agreement provided: "The second party cannot assign this lease or any interest therein, without the written consent of the first party." About ninety days prior to the termination of the agreement the City of Paris gave notice of cancellation with a request to vacate, giving as a reason therefor claimed infractions of paragraph seven of the agreement, which contained a clause, in effect, that all moneys received by Dr. Beckett should be turned in at the close of each day to the cashier of the City of Paris. The date to vacate was subsequently postponed for a period of twenty-four days, and upon Dr. Beckett's failure to vacate on such date the City of Paris caused his property to be removed from the premises.

The issue raised on appeal by the City of Paris is whether the agreement is a license or a lease. It contends that the agreement is a mere license and that Dr. Beckett's violation of its terms constituted a breach of the agreement and gave the City of Paris the right to terminate the license and exclude Dr. Beckett from access to its premises. Dr. Beckett contends that the instrument established the relationship of landlord and tenant.

[1-4] Its purpose was lawful and must therefore be interpreted from the contract itself to give effect to the mutual intention of the parties at the time it was executed. Civ.Code, §§ 1636, 1639, 1643. It may be conceded that the instrument provided for a definite rental and for its payment for an agreed period of time. Levin v. Saroff, 54 Cal.App. 285, 201 P. 961. The only essential question in dispute is the sufficiency of the description of the space and the boundaries of the property to be occupied. The agreement provided sole and exclusive right to conduct an optometry business within a space "to be designated" by the City of Paris, the space to be delivered in "good, tenantable condition". The use of the words "cannot assign this lease", "tenantable", "space demised", etc., is a circumstance which may indicate the intention of the parties, but it is not entirely determinative of the question of whether the instrument is a license or a lease. Morris v. Iden, 23 Cal.App. 388, 138 P. 120; Tiffany, Landlord and Tenant, sec. 7; R. H. White Co. v. Jerome H. Remick & Co., 198 Mass. 41, 84 N.E. 113. The supervisory powers reserved and the restrictions imposed may throw light upon the intention of the parties, but they are not controlling. No doubtful words in the agreement require legal interpretation. The true test is whether the one occupying the space designated has exclusive possession; if so, the agreement is a lease. If the instrument simply confers a privilege to occupy, it is a license. Shaw v. Caldwell, 16 Cal.App. 1, 115 P. 941; Dean v. Brower, 119 Cal.App. 412, 6 P.2d 580; Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002.

[5] This is not a case of a defective description which may be cured by the lessor placing the lessee in possession for the full term of the written agreement; on the contrary, the lessor reserved the right to change the location at any time during the life of the agreement. In the cases cited by Dr. Beckett the lessee was able definitely to locate and take possession for the term of the contract (Olcovich v. Deremberg, 27 Cal.App. 194, 149 P. 375; Baranov v. Scudder, 177 Cal. 458, 170 P. 1122), or a definite space in an area was designated subject to a change in location within a stipulated period (In re Owl Drug Co., D. C., 12 F.Supp. 439), or exclusive possession for a definite period of a maximum space was designated (Mehlman v. Atlantic Amusement Co., 65 Misc. 25, 119 N.Y.S. 222), or the lessee paid a bonus plus a stipulated sum per front foot (Herman v. Rohan, 37 Cal.App. 678, 174 P. 349), or the locality was specified on a blue print attached to the agreement. Williams v. Hylan, 126 Misc. 807, 215 N.Y.S. 101. In R. H. White Co. v. Jerome H. Remick & Co., supra, the agreement provided for a balcony location substantially forty feet in length to be used for the business of

selling sheet music. The court held the agreement to be a license. In the present case the agreement simply conferred an exclusive but revocable right from the City of Paris to personally operate an optometry department. It was based upon trust and confidence in business acumen and integrity. The concession was a part of the general business of the City of Paris to be conducted on a space, designated by it, that could be relocated or enlarged or decreased without the consent of Dr. Beckett. Gerould Co. v. Arnold Constable & Co., 1 Cir., 65 F.2d 444; Marcelle, Inc., v. Sol. & S. Marcus Co., 274 Mass. 469, 175 N.E. 83, 74 A.L.R. 1012. Under the terms of the agreement we cannot hold this instrument to be a lease.

[6] The complaint alleges that the ejection for which damages are asked was accomplished through force and violence. The evidence shows, perhaps, some personal violence by the agents of the City of Paris several weeks prior to the eviction, but none upon the date that Dr. Beckett's furniture and effects were removed from the premises. Plaintiff prayed for "loss of profit", "injury and loss of good will", "exemplary damages" and for "costs of removal". If Dr. Beckett did not have an exclusive privilege to the possession of the property under a lease contract, the City of Paris had a right for infractions of the agreement to terminate his occupancy. We are not concerned here with an action for breach of an agreement, such as a license, for a stated period of occupancy for which injunction proceedings might apply, but rather with an action for damages for eviction under a claimed lease contract. The judgment for actual damages must be set aside.

[7] Plaintiff's appeal is taken from that part of the judgment assessing the amount of damages on the first cause of action resulting from the alleged unlawful eviction. The determination that the relationship of landlord and tenant under a lease contract did not exist precludes plaintiff from damages for the eviction. The subject of this appeal is moot and hence will be dismissed.

The second cause of action alleges that the defendant became indebted to plaintiff in the sum of $11.03 for money had and received. In the judgment this amount is added to the sum assessed as actual damages. The defendant in its brief does not attack the correctness of this amount. Accordingly that part of the judgment, which is based on the second cause of action, will stand; the judgment in so far as it covers the first cause of action is reversed.

I concur: KNIGHT, Acting P. J.

---

33 Cal.App.2d 194

**PEOPLE v. WILSON et al.**

**Cr. 3209.**

District Court of Appeal, Second District, Division 2, California.

June 5, 1939.

**1. Criminal law ⚷1144(13)**

Where it is contended that evidence is insufficient to sustain a verdict, evidence must be viewed in light most favorable to respondent.

**2. Criminal law ⚷1159(2)**

Court of Appeal cannot substitute its judgment on facts for that of the jury where verdict is supported by substantial evidence.

**3. Criminal law ⚷1160**

It is jury's function in first instance, and of trial court after verdict, to determine facts established by evidence, and verdict approved by trial court cannot be set aside for insufficiency of evidence to support it unless there is clearly no substantial evidence supporting court's conclusion on any hypothesis.

**4. Criminal law ⚷741(1)**

Weight of evidence is for jury.

**5. Criminal law ⚷1160**

Findings of jury and trial judge approving verdict on motion for new trial are conclusive unless it can be said as a matter of law that there is no evidence to support them.

**6. Assault and battery ⚷92**

Evidence sustained conviction of assault with a deadly weapon.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Maurice W. Wilson, Manuel S. Silva, Donald H. Lucas, whose true name is Patrick L. O'Connor, Jr., and David B. Eaton were convicted of assault with a deadly weapon, and they appeal.

Affirmed.

Ben Van Tress and Beecher S. Stowe, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

The following opinion was prepared by the late Mr. Presiding Justice CRAIL and is adopted and published as the opinion of the court:

PER CURIAM.

Defendants were charged with one count of robbery and one count of assault with a deadly weapon. Defendants pleaded "not guilty" to both counts and were tried by a jury. The jury found them not guilty on count one and guilty on count two. Defendants moved for a new trial, which was denied, and it is from this order denying defendants' motion for a new trial that this appeal is taken.

[1] Viewing the evidence in the light most favorable to the respondent, which it is our duty to do where the contention is made that the evidence is insufficient (Koeberle v. Hotchkiss, 8 Cal.App.2d 634, 636, 48 P.2d 104), there is substantial evidence that the facts are as follows:

On the evening of January 2, 1939, the four defendants started out for a ride. Three of them were out of work, and the fourth (Eaton) was considering the purchase of the car in which they were riding. There was in the car about two gallons of gas, and the defendants had about two dollars between them. That afternoon defendant Wilson had taken a tire-iron out of the car and taped both ends of it so as to make a blackjack out of it. This was done in the apartment where all four defendants were staying. They drove around for an hour or more, and while driving north on San Fernando road, they saw Hurlbut, the complaining witness, who was "thumbing" a ride. Defendants passed him, but turned the car around and when they were again abreast of him invited Hurlbut to ride with them. He accepted and climbed into the rumble seat with defendant Wilson. They proceeded north to Glendale where, while apparently trying to find a friend of Wilson's, they drove off the highway and eventually came upon a dirt road. Here Wilson hit Hurlbut on the head with the taped tire-iron. Hurlbut was able to get out of the car, but was set upon by Wilson and two of the other defendants. As a result of the beating Hurlbut suffered two bumps on his head and a black eye. He let out screams of pain and defendants were frightened away. During the scuffle ninety-five cents disappeared from Hurlbut's pocket. (He was unable to testify whether this money was taken from him by defendants or was lost out of his pocket during the fight, and for this reason the defendants were found not guilty on the robbery count.)

Defendants have contented themselves in their briefs with arguing the facts. Their sole contention is that "the evidence is not sufficient to sustain a conviction of count two", but this contention has been presented four times, once for each defendant.

[2-5] Defendants' contention is answered by the language of Mr. Chief Justice Waste in the case of People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, 470, as follows: "On the record, the prosecution contends, there is substantial evidence tending to support the verdict of the jury, and that this court cannot, as a matter of law, substitute its judgment on the facts for that of the jury. No rule of criminal law and procedure is better established in this state. It is the function of the jury, in the first instance, and of the trial court after the verdict, to determine what facts are established by the evidence and, before the verdict of the jury which has been approved by the trial court can be set aside on appeal upon the ground of the insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. This court has uniformly held that where there is evidence tending to support a verdict we cannot disturb the verdict upon the ground that it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury. People v. Ellis, 188 Cal. 682, 688, 206 P. 753. The finding of the jury in this case was approved by

the trial court on motion for a new trial. The findings of the jury and the trial judge are conclusive upon this subject upon this court. It may disturb such a finding only when we can say, as a matter of law, that there was no evidence to support it. People v. Erno, 195 Cal. 272, 283, 232 P. 710."

[6] This court is satisfied that there is substantial evidence to sustain the verdict as to each of the defendants.

Order affirmed.

33 Cal.App.2d 196

**LAWRENCE et al. v. ROSENBERG et al.**

**Civ. 10860.**

**District Court of Appeal, First District, Division 1, California.**

**June 6, 1939.**

**Attorney and client ⚷166(2)**

**In action against copartners for professional services rendered as a customs attorney, evidence that the services were rendered with knowledge and consent of copartners and were not rendered on behalf of corporation formed by copartners sustained recovery against copartners.**

---

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Frank L. Lawrence and George R. Tuttle, as copartners doing business under the firm name and style of Lawrence & Tuttle, against Joseph Rosenberg and Isadore Rosenberg, copartners doing business under the firm name and style of Rosenberg Iron & Metal Company, for professional services rendered. From judgment for plaintiff, defendants appeal.

Affirmed.

Clyde C. Sherwood, of San Francisco, for appellants.

Perry Evans, of San Francisco, for respondents.

WARD, Justice.

This is an action for services rendered by a customs attorney in the recovery of duties, upon certain commodities, paid to the United States customs service under protest. The amount of the claim, which is not disputed, was assigned by Frank L. Lawrence to the partnership of Lawrence & Tuttle.

The Rosenberg Iron & Metal Company, conducted by the Rosenbergs, operated a rag department as an adjunct to its business. From 1921 until 1927 this department was operated as a copartnership under the fictitious name of National Sanitary Rag Company. In 1927, the National Sanitary Rag Company was incorporated and the stock issued to the members of the old partnership. The protest claims involved in this case remained in the name of the Rosenberg Iron & Metal Company, by which company they were originally made.

Appellants' contention is that upon the date of the contract of employment the partnership had terminated and its interests and assets had been transferred to the corporation, which would be responsible for the debt. It is not denied that Lawrence had been engaged to represent the partnership, and there is evidence to show that when the partners incorporated, the activities of Lawrence were with the approval of the corporation, and with the knowledge and consent of the members of the copartnership. Whether there was reasonable notice of the retirement of the copartners from the rag business as a copartnership, and of their formation of a corporation for conducting the same business, were questions of fact.

Lawrence as a witness testified that one of the copartners of the Rosenberg Iron & Metal Company employed him in connection with the transaction involved, namely, the obtaining of refunds for customs duties paid under protest. The manager of the corporation also discussed with him the various phases of the subject; that is, the "handling of the Rosenberg interests in imported rags under the tariff act of 1922 [42 Stat. 858]". This testimony is not contradicted unless it should be claimed that from certain documentary evidence a contrary conclusion could be reached. The trial court found that "the appearance of plaintiffs as attorneys of record for defendants in the United States Customs Court in regard to protests of the defendants against the collection of customs duties charged to the defendants was with the knowledge and consent of the defendants". This finding is supported by the evidence.

The judgment is affirmed.

I concur: KNIGHT, Acting P. J.

33 Cal.App.2d 233

## LOMAX v. HAGLUND.

**Civ. 11800.**

**District Court of Appeal, Second District, Division 1, California.**

**June 7, 1939.**

**1. Husband and wife 🔑347**

In action for alienation of wife's affections and criminal conversation, a paragraph of complaint, alleging "that by means of the premises * * * the affection which the said [wife] theretofore had for the plaintiff was alienated and destroyed," was sufficient, in absence of demurrer, as against contention that it sought damages only for alienation of affections and made no reference to criminal conversation as element of financial detriment, where wife's adulteries with defendant were enumerated in preceding paragraph.

**2. Appeal and error 🔑1004(1)**

To reverse judgment on jury's verdict because of excessive damages awarded, amount thereof must appear so plainly and outrageously excessive as to suggest passion, prejudice, or corruption of jury at first blush.

**3. Husband and wife 🔑334(3), 349**

A verdict awarding $5,000 damages for alienation of wife's affections and $20,000 for criminal conversation *held* not so plainly and outrageously excessive as to suggest passion, prejudice, or corruption of jury at first blush, as required to authorize reversal of judgment thereon.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by George J. Lomax against Abraham G. Haglund for alienation of wife's affections and criminal conversation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Leslie S. Bowden, of Los Angeles, for appellant.

John J. Craig, of Los Angeles, for respondent.

DORAN, Justice.

Defendant appeals from the judgment in favor of plaintiff, upon two causes of action, the first of which was for alienation of the affections of plaintiff's wife, for which the jury returned a verdict in the sum of $5,000, the second for alleged criminal conversation, for which a verdict was returned in the sum of $20,000.

[1] Appellant contends that the court erred in admitting evidence as to the second cause of action of the amended complaint, which in part alleged as follows:

"II. That on or about the 16th day of December, 1936, and again on or about the 24th day of December, 1936, * * * and on or about the 9th day of March, 1937, and again on or about the 11th day of March, 1937, and again on or about the 15th day of March, 1937, and again on or about the 23rd day of March, 1937, * * * the defendant on or about all of said dates and places unlawfully contriving and intending to injure the plaintiff and to deprive him of the comfort, society, aid and assistance of his said wife, wickedly, willfully and maliciously debauched and carnally knew the said Dorothy Lomax without the privity or consent of the plaintiff.

"III. That by means of the premises, and to wit, on or about the 4th day of April, 1937, the affection which the said Dorothy Lomax theretofore had for the plaintiff was alienated and destroyed and the plaintiff was deprived of the comfort, society, aid and assistance which he otherwise would have had from his said wife, and has suffered great distress of body and mind to his great damage in the sum of * * *."

It is urged by appellant in this connection that the allegations relating to criminal conversation in paragraph III as above set forth do not seek damages except for alienation of affection and that no reference is made therein to the criminal conversation as an element of financial detriment.

Respondent, on the other hand, contends as follows: "There was no demurrer filed, either general or special, and while we do not concede for a moment that the insertion in the charging clause, the fact that plaintiff lost his wife's affection by the adulteries enumerated, is improper, nevertheless, that portion thereof could be omitted and a complete cause of action stated by merely enumerating the adulteries and claiming damages therefor."

Respondent's contention is entitled to be sustained. Although that portion of paragraph III to which appellant objects could have been more appropriately set forth, nevertheless, in the absence of a demurrer, the allegations are sufficient.

[2, 3] It is also urged by appellant that the damages awarded by the jury are excessive; that there are no facts or circumstances in the evidence warranting an award such as the jury made.

It appears from the record that defendant had been married to plaintiff's sister for some time prior to the marriage of plaintiff in December, 1930. The relation between defendant and plaintiff's wife, out of which the litigation herein arose, appears to have had its beginning on New Year's Eve of 1933, at a New Year's party held at the home of plaintiff. Without referring to details, which would serve no useful purpose, it is sufficient to note that the evidence discloses that the relation between defendant and plaintiff's wife thereafter became progressively more intimate, and that at the same time and during the same period the attitude of plaintiff's wife toward plaintiff underwent a change, not unusual under such circumstances, until the separation resulted on April 4, 1937.

It is established law that before a judgment can be reversed because excessive, it must appear "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury". Hale v. San Bernardino etc. Company, 156 Cal. 713, 106 P. 83, 84. The same doctrine has also been affirmed in Eldridge v. Clark & Henery Const. Co., 75 Cal.App. 516, 243 P. 43; McManus v. Arnold Taxi Company, 82 Cal.App. 215, 255 P. 755; Potter v. Driver, 97 Cal.App. 311, 275 P. 526; Nitta v. Haslam, 138 Cal. App. 736, 33 P.2d 678. A review of the record herein produces no such reaction. In Fitzpatrick v. Clark, 26 Cal.App.2d 710, 80 P.2d 183, in an action for alienation of affections, a verdict for $22,500 was held not to be excessive.

For the foregoing reasons the judgment and the order denying the motions for judgment notwithstanding the verdict, are and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

---

33 Cal.App.2d 230

## GALLARDO et al. v. LUKE et al.

Civ. 10808.

District Court of Appeal, First District, Division 1, California.

June 7, 1939.

**1. Automobiles 🔑160(4)**

A decedent who was struck when pushing two-wheel cart across street was a "pedestrian" within definition of statute, and the two-wheel cart, while it might be termed a conveyance, was not a "vehicle" within definition of statute. Vehicle Code, §§ 31, 560, St.1935, pp. 95, 188.

[Ed. Note.—For other definitions of "Pedestrian" and "Vehicle," see Words & Phrases.]

**2. Negligence 🔑136(8)**

Where a person takes no precautions for his own safety and is injured, and such conclusion is uncontroverted, contributory negligence is question for trial court.

**3. Negligence 🔑136(9)**

If evidence is introduced relative to degree of requisite vigilance of person injured, and inferences therefrom are honestly debatable, whether person was contributorily negligent becomes a question of fact for jury to determine.

**4. Automobiles 🔑160(4)**

Where decedent was pushing a two-wheel cart across street in pedestrian lane at right angle to path of oncoming truck, truck driver was placed on notice that decedent was occupying pedestrian lane. Vehicle Code, §§ 31, 560, St.1935, pp. 95, 188.

**5. Automobiles ⚷245(72)**

Whether pedestrian who was struck by truck while attempting to push two-wheel cart across street should have halted at double line in center of street upon observing oncoming truck, whether pedestrian was prudent in walking or running with cart, and whether pedestrian stepped out of pedestrian lane before or after truck swerved in its course, were questions for jury. Vehicle Code, §§ 31, 560, St.1935, pp. 95, 188.

**6. Automobiles ⚷217(2)**

A pedestrian entitled to use a safety lane is not required to remain therein if ordinary prudence dictates that removal therefrom will avoid danger.

**7. New trial ⚷68**

While jury decided either that truck driver was not negligent, or, if he was, that decedent who was struck by truck while attempting to push two-wheel cart across street was guilty of contributory negligence, result of jury's conclusion was finally in control of trial judge as respects right to grant a new trial. Vehicle Code, §§ 31, 560, St.1935, pp. 95, 188.

**8. Appeal and error ⚷979(2)**

Trial court's action in granting motion for new trial on ground of insufficiency of evidence is binding unless trial court has abused its discretion.

**9. Appeal and error ⚷1015(2)**

Where evidence, as to whether decedent who was struck by oncoming truck while attempting to push two-wheel cart across street was guilty of contributory negligence was conflicting, trial court's order granting new trial for insufficiency of evidence to support a verdict for truck driver and truck owner was required to be affirmed. Vehicle Code, §§ 31, 560, St.1935, pp. 95, 188.

---

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Caterina Gallardo and Edward Gallardo, by G. Ottino, his guardian ad litem, against Lawrence Luke, Sterling Graham, and others, for death of plaintiffs' decedent when he was struck by a truck owned by Lawrence Luke and operated by Sterling Graham. From an order granting motion for a new trial, the named defendants appeal.

Affirmed.

Myron Harris, William H. Older, Appelbaum & Mitchell, and John Jewett Earle, all of Oakland, for appellants.

James F. Galliano, of Oakland, for respondents.

WARD, Justice.

This is an appeal by defendants from an order granting plaintiffs' motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict in an action under the provisions of section 377 of the Code of Civil Procedure.

There is substantial agreement relative to the topographical conditions existing at the situs of the accident. San Pablo avenue, running north and south in the city of Oakland, is approximately seventy feet in width, the center thereof divided by a double white line. The easterly half is again divided into two lanes, of which that nearest the curb permits space for parking or traffic. Francisco street, about thirty-five feet in width intersects San Pablo avenue. At or near the northerly curb line of Francisco street is the southerly painted line of a six-foot pedestrian lane marked across San Pablo avenue from the easterly to the westerly curbs thereof. Decedent, by means of a shaft attached thereto, was pushing or shoving a two-wheel cart about seven feet long and five feet in height from the westerly to the easterly side of San Pablo avenue in the pedestrian lane. He proceeded to the double line in the center of San Pablo avenue, halted, and then started to move forward. During this period, a truck, the property of defendant Lawrence Luke, was being operated by defendant Sterling Graham in the course of his employment, northerly on San Pablo avenue near its intersection with Francisco street. Just prior to the impact, the truck turned to its right, then swung to the left. The decedent had started running with the cart and as he did so he proceeded outside and to the north of the pedestrian lane. When about five feet from the easterly curb of San Pablo avenue, outside and beyond the pedestrian lane, the truck struck him, inflicting injuries from which he died.

[1] Respondents place great stress upon the negligence of the driver of the truck, a subject in which we are interested only incidentally, as the appellants for the sole purpose of appeal contend that there is but one issue presented, namely, the contributory negligence of the decedent. In

appellants' reply brief a suggestion is made that there is a serious question as to whether or not decedent was a pedestrian. If he was not a pedestrian, he should be placed in the category of an operator of a vehicle. The two-wheel cart might be termed a conveyance but it was propelled by human power and therefore is not within the purview of the term "vehicle" as used in section 31 of chapter 1 of the Vehicle Code, St.1935, p. 95. The decedent was on foot; that is, he was a walker as distinguished from a rider or driver, and he may therefore be declared to be a pedestrian as that term is used in section 560 of the above code.

[2, 3] Appellants have submitted a number of leading authorities from this and other states upholding the doctrine that reckless and heedless indifference to one's personal safety requires a determination that the contributory negligence is a question of law. We are mindful, however, of the fact that each case must be determined upon the facts presented, which brings us immediately to the question of whether the court was justified in submitting the contributory negligence issue as a factual matter to the jury. In Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518, 519, the court said: "When a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, contributory negligence is a question to be decided by the court. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Stephens v. Kaufmann, 137 Cal. App. 328, 331, 30 P.2d 536. If evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact for the jury to determine. Gore v. Market Street Ry. Co. [4 Cal.2d 154], 48 P.2d 2; Salomon v. Meyer, 1 Cal. 2d 11, 15, 32 P.2d 631; Anderson v. Market Street Ry. Co., 116 Cal.App. 282, 285, 2 P.2d 529."

[4-6] In the instant case decedent was attempting to cross at a right angle to the path of the on-coming truck. The driver of the truck was placed on notice that a pedestrian was occupying the lane. Wright v. Los Angeles Railway Corporation, Cal. App., 87 P.2d 877. Whether, in view of the distance of the truck from him, it was wise for the pedestrian to halt or to proceed when he reached the double striped line; whether it was prudent to walk or run in propelling the cart; whether decedent moved out of the pedestrian lane before or after the automobile truck swerved in its course, were questions of grave factual importance in determining the issue. Particularly the degree of prudence used by decedent in attempting to avoid the accident, and whether it was the ordinary prudence used by a person under similar circumstances, were questions of fact. A person entitled to use a safety lane is not required to remain therein if ordinary prudence dictates that removal therefrom will avoid danger. Umemoto v. McDonald, 6 Cal.2d 587, 58 P.2d 1274.

[7-9] The jury decided either that the defendant driver was not negligent, or if he was, that decedent was guilty of contributory negligence, but the result of the jury's conclusion was finally in the control of the trial judge. Smith v. Royer, 181 Cal. 165, 183 P. 660; Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243. In the instant case a scrutiny of the evidence shows that the experienced mind of the judge could reach a different though rational conclusion than the possibly equally reasonable one drawn by the jury. Upon the question of whether or not decedent misjudged his ability to avoid the impact with the truck, and whether he exercised due care and prudence under the particular circumstances presented in this case are debatable questions. Even if this court reached a conclusion in conformity with the views of the jury, it could not impose and substitute its views upon this controvertible issue unless the trial court abused its discretion. Anderson v. Dahl, 121 Cal.App. 198, 8 P.2d 883. We are not prepared from an examination of the record to so hold.

The order granting a new trial is affirmed.

I concur: KNIGHT, Acting P. J.

33 Cal.App.2d 313

## GOMES v. WARN et al.

Civ. 6120.

District Court of Appeal, Third District, California.

June 8, 1939.

**1. Assignments 🔑48**

No particular form is necessary to constitute an "equitable assignment," and any words or transactions which show an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective "equitable assignment."

[Ed. Note.—For other definitions of "Equitable Assignment," see Words & Phrases.]

**2. Assignments 🔑46**

The wrongful selling of mortgaged property by mortgagor at auction sale without knowledge or consent of mortgagee did not constitute an "equitable assignment" of receipts to mortgagee, so as to take precedence over subsequent levy of receipts by mortgagor's creditors, since there was no mutuality of purpose between mortgagor and mortgagee.

**3. Appeal and error 🔑877(2)**

Where mortgagee's complaint failed to show that she had any interest in receipts from wrongful sale of mortgaged personalty by mortgagor, which had been impounded in trial court, she could not be heard to complain of trial court's disposition of receipts.

**4. Pleading 🔑225(1)**

Where plaintiff failed to make application to trial court to be heard further after court sustained defendants' demurrer to her complaint, without leave to amend, judgment went against her as matter of law.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Virgie Gomes against M. A. Warn, K. P. Delson, and others, to recover receipts from sale of personalty on which plaintiff held mortgage and which mortgagor sold at auction sale. The defendants who were creditors of mortgagor levied upon receipts while in hands of auctioneer, and the funds were paid into court. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

H. L. Richardson, of Oakland, and Nathan B. McVay, of Modesto, for appellant.

Donald B. Fowler, of Turlock, and Leslie A. Cleary, Dist. Atty., and Walter G. Crow, both of Modesto, for respondents.

BRUTON, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment for defendants after an order sustaining defendants' demurrer to plaintiff's second supplemental and amended complaint, which alleges in substance that one Lima, the mortgagor, sold through an auctioneer certain mortgaged personalty without the knowledge or consent of the mortgagee thereof. The mortgagee is the plaintiff and appellant herein.

The sale was made in the name of the mortgagee and the sales receipts were held by the auctioneer in the mortgagee's name. Certain creditors of the mortgagor (Lima) levied upon the sales receipts in the hands of the auctioneer, and in this action plaintiff (mortgagee) seeks to recover those funds. The funds in question were paid into court, and upon the court sustaining defendants' (Lima's creditors) demurrer without leave to amend, were ordered paid to defendants.

There are but two questions presented here: First, did the mortgagor's sale of the mortgaged personalty without the mortgagee's authority or consent, but in her name, constitute an equitable assignment of the sales receipts to the mortgagee, which would take precedence over a subsequent levy of the mortgagor's creditors? Second, did the court err in its judgment wherein it ordered the payment of the impounded sales receipts to the defendants after sustaining defendants' demurrer without leave to plaintiff to amend her complaint?

[1] Answering the first question: "No particular form is necessary to constitute an equitable assignment, and any words or transactions which show an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment." 6 Corp. Juris Secund. § 58, p. 1101.

[2] The instant transaction is entirely lacking in that mutuality of purpose neces-

sary to have equitably assigned to appellant the proceeds of the unauthorized sale of the mortgaged personalty. The demurrer was properly sustained.

[3, 4] The answer to the second question is implied in that of the first. If appellant had no interest in the impounded sales receipts, and her complaint shows that she did not, she may not be heard to complain of their disposition in the court's judgment. In addition she made no application to the court to be heard further after the court sustained defendants' demurrer to her second, supplemental and amended complaint, without leave to amend; and having failed to do so, judgment went against her as a matter of law. Murphy v. Murphy, 57 Cal.App. 182, 207 P. 43.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

---

33 Cal.App.2d 236

## PEOPLE v. KERMOTT.

Cr. 384.

District Court of Appeal, Fourth District, California.

June 7, 1939.

**1. Homicide** 🔑268

Where accused contended that brother was an intruder and was not recognized by accused at time of homicide, evidence was sufficient to justify submission to jury of issue of whether accused knew that his brother was the intruder so as to justify conviction for manslaughter.

**2. Homicide** 🔑157(1)

In prosecution for murder of brother of accused, evidence of prior disputes and ill will between accused and his brother was admissible on question of malice.

**3. Homicide** 🔑157(1)

In prosecution for murder of brother of accused, court which admitted evidence of prior disputes between accused and his brother erred in refusing to permit accused to introduce testimony tending to show that the disputes had been settled six weeks before date of homicide and that therefore any occasion for ill feeling was terminated.

**4. Homicide** 🔑338(3)

In prosecution for murder of brother of accused, error of court which admitted evidence of prior disputes between the brothers, in refusing to permit accused to introduce testimony to show that the disputes had been settled was not prejudicial in view of fact that testimony of accused himself disclosed that ill feeling still existed between the brothers.

**5. Homicide** 🔑338(5)

Jury which found accused guilty of manslaughter impliedly found that there was no malice or ill will, and any error in receiving or rejecting evidence relating thereto was not prejudicial.

**6. Criminal law** 🔑807(1)

Portion of instruction defining degrees of murder and kinds of manslaughter which referred to intention of Legislature in dividing murder into degrees and establishing tests by which degrees of murder may be determined was not subject to attack on ground that it was argumentative.

**7. Criminal law** 🔑763(9)

Portion of instruction defining degrees of murder and kinds of manslaughter to effect that intention to kill and act of killing may be as instantaneous as successive thoughts of the mind was not subject to attack on ground that instruction constituted an instruction as to existence of facts which should be left to jury.

**8. Criminal law** 🔑823(17)

Portion of instruction defining degrees of murder and kinds of manslaughter to effect that there is a natural presumption that an assailant intends death or great bodily harm where he violently assails another with a dangerous weapon which is likely to and does in fact destroy life was not erroneous on ground that it failed to distinguish between one who assails another voluntarily and one who is forced to do so in self-defense where such element was amply covered in other parts of the instruction.

**9. Criminal law** 🔑823(6)

Instructions relating to what is justifiable homicide which set forth requirement that accused believed certain things at the time "as a reasonable man" were not erroneous for failure to refer to conduct of a reasonable man "under the same or similar circumstances" where general circumstances were rather completely referred to and instruction could not be taken other than as referring to conduct of a reasonable man under those circumstances.

**10. Criminal law 🔑822(14)**

Instruction that if any witness had in jury's judgment sworn falsely in any respect the witness was to be distrusted in other respects and "his or her testimony should not be acted upon without great caution" was not erroneous where court informed jury in same instruction that jurors could believe the whole or any part of testimony of any witness.

**11. Criminal law 🔑785(16)**

Instruction that if any witness had in jury's judgment sworn falsely in any respect witness was to be distrusted in other respects and his testimony should not be acted upon without great caution was not prejudicial on ground that effect of the instruction was directed particularly against accused and members of his family because they were sole witnesses as to what transpired just prior to the homicide with which accused was charged.

**12. Criminal law 🔑829(1)**

Refusal of requested instruction was not error where instruction in so far as applicable was covered by given instructions.

**13. Criminal law 🔑829(4, 5)**

Refusal of instruction relating to self-defense and justifiable homicide, the general subject of which was covered by given instructions, did not constitute prejudicial error.

**14. Criminal law 🔑1171(2)**

In murder prosecution, improper remarks of deputy district attorney in opening statement and in relation to introduction of evidence did not require reversal in view of record indicating that no miscarriage of justice occurred.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Jack A. Kermott was convicted of manslaughter, and he appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was charged with the murder of his brother, James C. Kermott. A jury found him guilty of manslaughter and he appeals from the judgment and from an order denying his motion for a new trial.

The appellant lived on a two-acre tract north of the city of Upland, the house being about eighty feet back from the road and some 500 feet from the nearest other residence. There were a number of trees and shrubs to the east and south of the house, which faced in an easterly direction. On the evening of November 30, 1938, the appellant was playing cards with his wife and his wife's father and mother. At about 10 o'clock his wife went to the bathroom and on her return told the appellant that she had heard a noise outside of the house and requested him to go out and investigate. After waiting a few moments the appellant took a flashlight and a revolver and went outside. He went out through a rear door and after looking around the west side of the house he passed around the north side and walked in an easterly direction across the front yard and toward the street.

Having seen nothing he started to return across the lawn toward the front door of the house. As he arrived at a point about fifteen or twenty feet from the front door he saw the figure of a man by a tree near the southeast corner of the house and some twenty feet to his left. He called out something, just what he could not remember, and immediately fired a shot at the intruder. About the time this shot was fired the man turned toward him and then started to walk easterly toward the street. The appellant followed him, firing three more shots and when he was within ten feet of him the man fell to the ground. The appellant approached and, as he testified, for the first time turned his flashlight upon the man and saw that he had shot his brother. He then entered the house and requested members of the family to call a doctor and the police, after which he went back and found that his brother had ceased breathing. When the officers arrived they found near the left hand of the deceased a sock, in the end of which had been tied a metal Chinese image. They also found footprints, similar to those which would be made by the tennis shoes worn by the deceased, along the south side of the house and near the northwest corner thereof, where the bathroom is located. The deceased's automobile was found parked on another road about two hundred feet from the appellant's home. The appellant told them what had occurred, and on the next day he made a statement, which was taken down by a shorthand reporter, and testified at the inquest.

The deceased lived in Ontario, about nine miles from the appellant's home. He left his home about 9:45 p. m. on the night in question. His wife testified that the sock found near his body was one belonging to him, that she saw him put this sock in his pocket before he left home, but that she did not see the Chinese image, which was usually kept on a stand in their home. Evidence was received of ill-feeling between the brothers arising out of controversies over some books in the possession of the appellant, over some furniture which he had previously borrowed from the deceased, and over the appellant's handling of an estate in which he was a trustee. It appears that the two brothers had met by appointment and had held a conference at a street corner near the business district of Upland, about five o'clock on the afternoon preceding the tragedy.

The appellant contends that the court erred in instructing the jury with regard to, and in submitting to it the issue of whether he was guilty of, murder, and further erred in admitting evidence concerning prior disputes and controversies between the brothers for the purpose of showing ill-will, malice and criminal intent. It is argued that it conclusively appears that the appellant did not know the identity of the intruder, and that evidence of ill-will or malice toward the brother was therefore inadmissible.

[1, 2] While the appellant testified and insisted at all times that he did not know that the intruder was his brother we think there was sufficient evidence to justify the submission of this issue to the jury. There was evidence that it was a rather clear night although there was a light high fog. A deputy sheriff testified that when he arrived shortly after the shooting he could distinguish between people who were known to him at a distance of thirty feet. The deceased was dressed exactly as he had been when the appellant saw him at 5 o'clock, wearing overalls, a dark blue shirt, a light gray sweater shirt, and tennis shoes. Although the appellant was carrying a large flashlight with which he said he could distinguish objects at from seventy to seventy-five feet, and which he had taken with him for the purpose of seeing who was there, he says he did not turn this flashlight toward the intruder until after he fell, although he followed him a considerable distance and was within twenty feet of him when he first shot. He testified that the intruder did not approach him, that he made no movement toward him with his hands, and that he walked away from him toward the road. He did say, however, that before the intruder started to walk away he turned, facing him. The bullet that killed the deceased entered his body about the middle of his chest and came out of his back. When the appellant went into the house after the shooting he said to his wife and his wife's parents: "Somebody came up once too often." When the officers came and asked what had happened, he told them, "I have had trouble but it was not worth this". When asked at the inquest why he had arranged to meet the deceased at a street corner at 5 o'clock instead of asking him to come to his house, he replied: "To avoid trouble." It is not without significance that during that interview they had quarreled over some books, a part of which were stored in the basement of appellant's home, which basement had an outside door, and that the deceased had said to the appellant that "he was going to get them some way or another". There was sufficient evidence to justify an inference that the appellant knew the identity of the intruder, the murder issue was properly submitted to the jury, and the evidence of prior disputes and ill-will was admissible on the question of malice.

[3] It is next urged that the court, having admitted evidence of prior disputes between the brothers, erred in refusing to permit the appellant to introduce certain testimony for the purpose of showing that these disputes had been settled at least six weeks before the date of the homicide and that, therefore, any such occasion for ill-feeling, at least in so far as the appellant is concerned, had been terminated. The court rejected this evidence on the ground that the parties were not entitled

to go into the merits of the previous controversies but were only entitled to go into the matter for the purpose of showing whether or not any ill-feeling existed. In our opinion, the court unduly restricted the appellant with respect to going into these matters. While some of the rulings thereon were technically correct, it clearly appears that a considerable portion of the rejected evidence went to the issue as to whether or not ill-feeling existed at the time of the shooting rather than to the merits of the prior controversies.

[4, 5] However, we think these errors were not prejudicial for two reasons. While it was sought by the offered evidence to show that any cause for ill-feeling between the brothers growing out of these matters had been terminated, the testimony of the appellant himself discloses that as a matter of fact such feeling still existed. In appellant's statement made the following day, in referring to the interview he had had with his brother about five hours before the shooting occurred, the following appears:

"Q. What was said about the books? A. He said he wanted the books.

"Q. What did you say? A. I told him he could not have them.

"Q. What did he say? A. He got kind of mad.

"Q. What did he say? A. I don't remember exactly the words he said.

"Q. Were you mad? A. Sure I was mad.

"Q. You got angry? A. Yes."

A further consideration is that the jurors would have found the appellant guilty of murder if they had believed that he was actuated by malice toward the person whom he shot. Having found him guilty of manslaughter the jury has impliedly found that there was no malice or ill-will, and any errors in receiving or rejecting evidence relating thereto were not prejudicial.

[6-8] Error is assigned in the giving of certain instructions. A long instruction defining the degrees of murder and kinds of manslaughter, and covering what is and what is not sufficient to constitute these various crimes, is first attacked. It is stated that while this instruction may be correct "as a treatise on the law of homicide" certain portions thereof are erroneous. It is argued that a portion of the instruction referring to the intention of the legislature in dividing murder into degrees and establishing tests by which degrees of murder may be determined is argumentative, and that other portions to the effect that the "intention to kill and the act of killing * * * may be as instantaneous as successive thoughts of the mind" are instructions as to the existence of facts which should be left to the jury. These portions of this instruction are in the usual form, have been approved many times, and the objection here made is without merit. It is further urged that a portion of this instruction to the effect that there is a natural presumption that an assailant intends death or great bodily harm where he violently assails another with a dangerous weapon which is likely to and which does in fact destroy the life of the party assailed, is erroneous. It is argued that this fails to distinguish between one who assails another voluntarily and one who is forced to do so in self-defense. This element was amply covered in many other parts of the instructions, including the use of the words "voluntarily" and "wilfully" in giving the same rule, in other language, in the sentence preceding the one which is here questioned.

[9-11] It is next contended that two instructions relating to what is justifiable homicide, in setting forth the requirement that the accused believed certain things at the time "as a reasonable man", were erroneous in failing to refer to the conduct of a reasonable man "under the same or similar circumstances". The general circumstances were rather completely referred to and the instruction could not be taken other than as referring to the conduct of a reasonable man under those circumstances. In another instruction the jurors were told that if any witness had, in their judgment, sworn falsely in any respect the witness was to be distrusted in other respects and "his or her testimony should not be acted upon without great caution". The quoted portion is criticised, the appellant arguing that even if a witness had testified falsely in one respect the jury had a right to believe other portions of his testimony. The court so told the jury in the same instruction, saying: "The jurors may believe the whole or any part of the testimony of any witness." It is further argued that the effect of this instruction was directed particularly against the appellant and members of his

family since they were the sole witnesses as to what transpired just before the shooting. Not only is this contention untenable, but we are pointed to no false testimony given by these witnesses which could have led to the jury's misapplying this instruction. While the criticised portion of this instruction might well have been omitted, when it is taken with the context no prejudicial error appears. Finally, it is claimed that an instruction on self-defense or justifiable homicide is erroneous in that it fails to take into consideration the unusual circumstances of this case, where an unknown intruder unexpectedly appeared upon appellant's premises. This instruction, with other instructions upon the same and related subjects, fully covered this issue as presented by the evidence and we find no error.

[12, 13] Complaint is made of the court's refusal to give certain instructions asked for by the appellant. The first of these covered the rule usually applied in civil cases that a person confronted with imminent danger is not required to exercise the same degree of care and caution that is required of one under other circumstances. In so far as here applicable, the matter was fully covered by instructions which were given. In the second instance, although the court had given an instruction on excusable homicide following the language of the statute, the offered instruction attempted to define and apply the word "accident" in a manner not provided for in the statute. It is argued that a further requested instruction should have been given since it covered the matter of fear on the part of the appellant created by the mere presence of the deceased upon the appellant's premises, which element it is said was not covered in the instructions on self-defense and justifiable homicide which were given by the court. The general subject was covered in several instructions given. While one of these mentioned an "overt act" on the part of the deceased, who was the intruder, it is still true that the mere presence of the deceased at the time and place in question was, in itself, an overt act. We think that the matter was sufficiently covered and that no prejudicial error appears.

It is contended that the district attorney was guilty of prejudicial misconduct. In his opening statement a deputy district attorney stated that they would contend that the deceased went to the appellant's home that night by "arranged appointment" with the appellant. On two occasions while the appellant was on the stand he was asked, in effect, whether he had not made such an appointment, which he denied. No attempt was made to prove that such an appointment had been made other than by a question asked of the wife of the deceased, an objection to which was sustained. The wife of the deceased was asked as to their family and was allowed to testify that she and her husband had a son and a daughter. It is argued that this was dragged in for the purpose of inciting prejudice against the appellant. When the appellant denied having answered a question in a certain manner, in his statement which was taken on the afternoon of December 1, the deputy district attorney asked him, "Have you got anything else you would like to change in your statement?" An objection was sustained and, at the request of the appellant, the court instructed the jury to disregard the remarks made by counsel and to consider only the evidence. In referring to the estate in which the appellant was a trustee, and concerning which some dispute between the brothers had previously arisen, the deputy district attorney asked the appellant, "At this time you are the only living beneficiary named in that will, aren't you?" It is insisted that this was intended to suggest to the jury that the appellant had profited by killing his brother. An objection was sustained but the court was not requested to instruct the jury to disregard the matter. It is argued that these various matters were injected by the district attorney for the purpose of prejudicing the jury against him and that they had such a result.

[14] With respect to most of these matters the action of the deputy district attorney was unnecessary and inexcusable. As was said in People v. Shaw, 111 Cal. 171, 43 P. 593: "These alleged errors could and should have been avoided; but criminal cases are too often conducted upon the preconceived theory that defendant is guilty, and that if he be given a fair trial, according to the established rules of evidence, the jury may not convict him." In view of the record here, which we have read in its entirety, we are unable to hold that these evidences of mistaken zeal or unfairness on the part of the district attorney are sufficiently prejudicial to jus-

tify a reversal. While we do not approve of the conduct of the district attorney in these and certain other respects we are far from convinced that a miscarriage of justice has occurred. While minor errors appear, as is more or less natural in the trial of a case of this length and nature, a reading of the record leaves a strong impression that the result was quite favorable to the appellant.

The order and judgment are affirmed.

We concur: MARKS, J.; GRIFFIN, J.

## WATERLAND v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 6232.

District Court of Appeal, Third District, California.

June 3, 1939.

**1. Courts** 🔑200½

A probate court has no jurisdiction to try or determine title to property claimed in good faith by an executor in his individual capacity after his resignation and after the appointment and qualification of his successor, notwithstanding provisions of Probate Code concerning resignation of an executor and authorizing his successor to enforce an accounting. Probate Code, §§ 520, 923.

**2. Courts** 🔑200½

While an executor is acting for the estate and his privity to probate proceedings continues to exist, a probate court has jurisdiction to determine title to property claimed by executor, but such jurisdiction ceases when executor is no longer acting in that capacity.

---

On petition for rehearing.

Rehearing denied and former opinion modified.

For former opinion, see 90 P.2d 344.

Busick & Busick and O. F. Meldon, all of Sacramento, for petitioner.

Johnson & Curtwright, of Sacramento, for respondents.

Evan J. Hughes and Charles A. Bliss, both of San Francisco, amici curiæ.

PER CURIAM.

On petition for rehearing our attention is called to certain omissions and inaccuracies which occurred in reciting the facts in our opinion which appears in 90 P.2d 344. While we believe these changes are immaterial to the determination of the issue involved on this proceeding, it is ordered that the opinion be and it is hereby modified as follows:

On page 347 of the above citation, line 25 from the top of the second column, strike out the figures "1937" and insert in lieu thereof "1938". On page 348, line 1 at the bottom of the second column, strike out the words "injured by being". On page 349, line 12 from the top of the first column, strike out the word "would" and insert in lieu thereof the word "might". On page 346, line 5 of the second column, following the citation of "Estate of Grafmiller, 27 Cal.App.2d 253, 81 P.2d 181", add the following: "After his resignation, and before his successor was appointed or qualified, he filed two purported final accounts, neither of which was settled or approved. In neither of those accounts did he return the joint tenancy fund as property of the estate. Numerous exceptions to those accounts were filed by the heirs of the deceased."

[1] It is strenuously urged that the opinion is contrary to law. From elaborate arguments in two briefs it appears that the opinion is misunderstood in some respects. The material question which is determined in the opinion is very simple. Apparently that precise question has not arisen nor has it been previously decided in any California authorities. The question is this, has the probate court jurisdiction to try and determine title to property which is claimed in good faith by an executor of an estate in his individual capacity after his resignation, and after the appointment and qualification of his successor, or must the title to property, under such circumstances, be then determined in either a court of law or equity? We have held in accordance with the generally accepted rule that the probate court lacks jurisdiction under such circumstances to try or determine title to such property. It is forcefully and sensibly argued that section

520 of the Probate Code provides that an executor may resign "to take effect" only "upon the settlement of his accounts"; that after his authority ceases he may be cited by his successor to account to the probate court for all property *belonging to the estate* which came into his hands (sec. 923, Probate Code), and that the right to enforce an accounting confers jurisdiction on the probate court to determine all facts incident thereto even to the trying of title to property contrary to the general rule. These contentions, however, extend the exception to the general rule above mentioned far beyond any decision of the Supreme Court which has been rendered. We are of the opinion that when an executor has resigned and his successor has qualified, that in contemplation of law, he is no longer executor of the estate, but on the contrary that his individual claim to property in good faith must then be determined in another tribunal of competent jurisdiction, and that the probate court loses its jurisdiction to try title to such property. The reason for that conclusion, as expressed by the authorities is that the obstacle preventing an executor from bringing an action against himself since he may not become both a plaintiff and a defendant in the same action, has been removed by his resignation and it becomes the duty of the acting executor or administrator to then bring suit against him in a proper court to determine the title.

The cases relied on by the respondents are Estate of Vucinich, 3 Cal.2d 235, 44 P.2d 567; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Estate of Ginsberg, 11 Cal.App.2d 210, 53 P.2d 397, and Estate of Radovich, 74 Cal. 536, 16 P. 321, 5 Am.St.Rep. 466. None of these cases are in point. In these cases the executor or guardian claiming the property involved remained as representatives of the estates. They had not resigned. Their successors had not been appointed as in the present proceeding. In the Radovich case the former executor never claimed title to the railroad stock in question. He merely claimed it had no value.

In Estate of Ginsberg, supra, cited by respondents, the jurisdiction of the probate court was neither challenged nor considered. In that case the executor does not appear to have resigned.

[2] Those cases merely reaffirm the well-recognized rule that while the representative is acting for the estate and his privity to the probate proceedings continues to exist the probate court may therefore determine title to property which he claims. It is invariably asserted that the power to determine title to property exists in the probate court *as against an executor.* That is the limitation of its authority in that respect. When he is no longer executor, that authority ceases, and the probate court loses its jurisdiction to try title. This court has definitely determined in 90 P.2d 344, that Waterland is not the executor of the estate of Grafmiller, deceased. We believe that our opinion has drawn the proper distinction between the cases, and that the probate court lacks jurisdiction to try or determine title to the bank account in dispute.

With the modifications enumerated, the petition for a rehearing is denied.

33 Cal.App.2d 20

## PEOPLE v. SAMBRANO.

**Cr. 1672.**

District Court of Appeal, Third District, California.

June 6, 1939.

Hearing Denied July 6, 1939.

**1. Homicide** 🔑253(1)

Evidence *held* sufficient to support conviction of first degree murder.

**2. Homicide** 🔑192

In murder trial, evidence that defendant's beet knife was used on victim was material to show that defendant was assailant, though latter may have also used another weapon to inflict another fatal wound than that inflicted by such knife.

**3. Criminal law** 🔑404(4)

In murder trial, defendant's automobile, used in commission of homicide, and front seat thereof, on which there were dark stains, which expert testified might be blood, were competent evidence.

**4. Criminal law** 🔑404(4)

In trial for murder, in commission of which defendant used automobile, the speedometer thereof, containing spot positively identified by expert witness as blood, was properly admitted.

**5. Criminal law ⚷1169(3)**

In murder trial, admission of willow leaves, found in drip pan of defendant's automobile, to show that he was in immediate vicinity of willow thicket, wherein deceased's body was concealed, was harmless to defendant, where he admitted such fact and showed officers where he parked automobile near spot where body was found.

**6. Criminal law ⚷516**

In murder trial, officer's testimony as to defendant's statement, containing no admission of guilt, but declaring that his companion disappeared with deceased in thicket and soon came running back and said he had killed deceased, was admissible to show admissions of facts without proof that it was voluntarily made without offer of reward or threat of punishment.

**7. Criminal law ⚷516**

A preliminary showing of voluntary nature of statement by defendant is unnecessary to render it admissible in evidence when it amounts to only admission of facts as distinguished from confession of guilt.

**8. Criminal law ⚷413(1)**

In murder trial, testimony of defendant's former employer as to statements by defendant and his brother that only reason he did not let his parents and relatives know of his presence in city of brother's residence after commission of homicide in another city, was because they condemned his living with woman not married to him, was incompetent as hearsay and self-serving.

**9. Criminal law ⚷1170(1)**

In murder trial, rejection of evidence of defendant's efforts to borrow money from witness to repair tire on automobile, used in commission of homicide, was harmless to defendant.

**10. Criminal law ⚷438**

In murder trial, photographs of thicket in which deceased's body was found, defendant's beet knife and spot where it was discovered, and defendant himself at point where he voluntarily showed officers that he parked his automobile at time of homicide, were admissible.

**11. Criminal law ⚷1169(3)**

In murder trial, admission of photograph of defendant at point where he voluntarily admitted to officers that he took deceased in automobile and parked it at time of homicide was not prejudicial to him.

**12. Criminal law ⚷1169(1)**

In murder trial, admission in evidence of photograph of defendant's beet knife, with which crime was committed, at spot where it was found, was not prejudicial to him.

**13. Criminal law ⚷438**

Photographs accurately depicting locality of crime charged, together with weapons, objects, and physical conditions unchanged in status or relation to other surrounding conditions as shown by accompanying testimony, may be received in evidence.

**14. Criminal law ⚷829(15)**

Rejection of defendant's proposed charge on circumstantial evidence was harmless to him, where jury was definitely instructed on all necessary elements respecting such evidence.

**15. Criminal law ⚷805(1)**

The trial court's charge to jury should be as concise as may be consistent with issues necessarily involved and protection of accused's rights.

**16. Criminal law ⚷776(4), 829(8)**

A proposed instruction that defendant's good character, if satisfactorily established, should be considered by jury and was sufficient ground for acquittal if they entertained reasonable doubt of his guilt, was properly rejected as covered by instructions given and argumentative.

**17. Criminal law ⚷776(2)**

An instruction that evidence of defendant's good character is competent on theory that there is some mistake or misrepresentation in prosecution's evidence was properly refused as argumentative and unfairly casting suspicion on character of prosecution's evidence.

**18. Criminal law ⚷823(8)**

Refusal of instruction that evidence of defendant's good character is competent on theory that there is some mistake or misrepresentation in prosecution's evidence was not prejudicial or erroneous, in view of instructions to consider every essential fact and circumstance and acquit defendant unless jury was fully satisfied of his guilt.

**19. Witnesses ⚷274(1)**

In murder trial, district attorney was properly permitted to cross-examine defendant's character witness as to whether he knew that defendant was paroled prisoner and pleaded guilty of "car prowling" and served sentence therefor in city prison.

**20. Witnesses ⚷274(1)**

In absence of bad faith, witness testifying as to accused's good reputation for peace and quiet or truth, honesty and integrity may be asked on cross-examination whether he knows of and considers specific acts and conduct inconsistent with such reputation, where such acts actually occurred or examing attorney believes in good faith that defendant was guilty thereof.

**21. Criminal law ⚷798½**

Defendant was not prejudiced by trial court's failure to include among forms of verdict handed to jury one drawn on theory of defendant's innocence, where such form of verdict was given jury before it began consideration of evidence and court informed jurors as to various forms of verdicts they should consider after evidence was closed and arguments completed.

**22. Criminal law ⚷1144(14)**

In absence of contrary showing, appellate court must assume on appeal from judgment on verdict of conviction that all proper forms of verdict were placed in jury's hands before it actually began deliberations or consideration of defendant's guilt or innocence.

---

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Joe Sambrano, alias Joe Boscas, was convicted of first degree murder, and he appeals.

Affirmed.

Charles H. Epperson, of Stockton, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

The defendant was charged with the murder of Fortunado Jiminez, and with a former conviction of another felony. The defendant admitted the former conviction and the jury found him guilty of murder of the first degree, recommending a penalty of life imprisonment.

The appellant contends the verdict is not supported by the evidence; that there is no evidence of a motive for the murder; that the court erred in admitting and rejecting testimony, and in the instructions which were given to the jury and refused. It is also asserted the district attorney was guilty of prejudicial misconduct in his argument to the jury.

[1] It is conceded that Fortunado Jiminez was atrociously murdered. The identity of his slayer is established only by circumstantial evidence. The record contains slight evidence of a motive on the part of the defendant for the killing of the deceased. We are directed to no substantial evidence of previous trouble between them. We have therefore carefully read the entire record.

The interested parties to the crime are Mexicans. They were farm laborers. The deceased, who was apparently an unmarried man, had lived in Stockton for several years. Witnesses testified to his good reputation. He had frequently associated with the defendant, Joe Sambrano, who was also known as Joe Boscas. For ten years the defendant lived in Stockton with a Mexican woman named Artemisa Romero to whom he was not married. They had two children. He worked as a farm laborer in that vicinity. He owned an old Ford automobile. In 1928 he served a sentence in San Quentin for grand larceny of an automobile. At the same time another Mexican by the name of Ramon Gomez, alias Pablo Gonzales, alias Ferdinando Carbajal, was also imprisoned in that institution. During their term of imprisonment the defendant and Carbajal associated as friends. After his discharge from prison Carbajal also moved to Stockton where he lived for some time prior to the homicide. An acquaintance of the defendant and his common-law wife gave to them a heavy beet knife ordinarily used in the fields with which to dig and top beets. This knife was afterwards frequently seen in the defendant's kitchen. Two witnesses named Camacho and Rojas saw it on the floor of the defendant's automobile near the clutch two or three days before the homicide occurred. It had a loose handle. When he was asked why he carried it in his machine, he replied, "I am going to work too; * * * I am bringing the knife to work, to top beets." When his associate, Camacho, said, "That knife isn't any good anyhow, what do you want it for?" he replied, "In order to defend myself or kill a cabron." The Spanish interpreter defined the word "cabron" to mean a wild goat, an adulterer, or one who conceals his knowledge of the unfaithfulness of another man's wife. The inference is drawn that the defendant was threatening to kill someone who was guilty of participating in the wife's unfaithfulness.

The three-inch prong or angle usually found on a beet knife, for the purpose of impaling the beet before topping it, had been filed off the long, heavy blade of that knife to make it more suitable for ordinary use about the kitchen. That is why Camacho told the defendant it was not "any good" as a beet knife when he saw it in his automobile. After the homicide it was found in the thicket in the vicinity of the body with blood, human hairs and woolen fabric, like the cloth in the dead man's jacket, upon it. It was positively identified as the knife which was given to the defendant's wife two years previously.

Sunday morning, November 5, 1938, at 10 o'clock, the defendant left his home in Stockton and drove his automobile down town. He said that he quarreled with his wife that morning; that he bought a cheap tire at a Japanese junk shop and was returning along Center street when he saw the deceased and his friend Ferdinando Carbajal on the sidewalk talking together; he said both of them got into his machine and asked him to take them to Santa Fe Park to meet a man, whose name he did not remember; that Carbajal then said: "Well, we go for a ride * * * on some island to look for work"; that the defendant protested but his companions insisted on continuing along the San Joaquin river road towards Holt; that they finally turned on to an unfrequented dirt road that led to the levee and parked their car at the margin of a thick willow grove about 200 feet from the river in an isolated district on Rough and Ready Island; that his companions then got out of the machine and with the remark on the part of Carbajal that "he want to talk with the other fellow", they disappeared in the thicket; that they did not travel more than 75 feet from the machine, and Carbajal was gone only ten minutes, which time the defendant spent in changing a tire; that he could hear them talking and laughing all the time, but heard no outcry or unusual disturbance; that Carbajal came running back to the car and said "Come on, I just killed a s-of-a-b, let's get out of here". The defendant positively identified the man whom he thus charged with admitting the killing of Jiminez, as his friend, Carbajal, from a picture which he was shown in the Los Angeles gallery of ex-convicts.

As a matter of fact there is substantial evidence, which the jury must have believed, that Carbajal did not accompany the defendant and Jiminez Sunday morning on their journey to the fatal willow patch where the murder occurred. Mr. Reyes testified that he saw the defendant drive his machine up to the sidewalk on Center street the morning of November 5th and wait for the deceased, whom he knew well, to approach; that Jiminez was alone and Carbajal was not with him; that the defendant spoke to the deceased who got into the front seat of the automobile, and they drove away together. Regarding the presence of Carbajal or any other person, the witness was asked: "Q. Was anyone else with them? A. No. Q. Are you sure only the two men were in the car? A. Yes." That fact was corroborated by the wife of the defendant.

When the defendant was brought back to Stockton after his arrest, he was confronted by Carbajal, who had not left Stockton. The defendant then repudiated his former statements to the effect that Carbajal had told him he had killed Jiminez. He merely said he was mistaken; that Carbajal was not the man. Afterwards the defendant said that when Carbajal came running back from the thicket he told him "He had a fight with Francisco [Fortunado] * * * He run away; he run away." And he added, "Let's go home".

The defendant's wife also corroborated Mr. Reyes in his statement that Carbajal was not with the defendant and the deceased when they drove from the city Sunday morning before the homicide occurred. She was an unwilling witness, but testified that the defendant drove away from home alone that morning, but returned a little later that forenoon "for his clothes and blankets and belongings. * * * he arrived accompanied by Diablito". Evidently the defendant's story about picking up Carbajal and the deceased on the street and driving with them to the willow patch is not true. The deceased was commonly known as Diablito. Mr. Camacho testified to that fact. The time when the defendant and the deceased left home together Sunday forenoon was the last Artemisa Romero saw of her husband until after his arrest. After the homicide, she was shown the picture of the slain man and recognized him as Diablito who was at their home Sunday morning in company with her husband. The fact that the defendant took his clothes and belongings at that time indicates that he did not intend to return. The defendant then wore a brown suit of clothes.

After the defendant left the willow grove where he admits the deceased disappeared, he drove to Modesto, arriving toward evening at the home of an acquaintance by the name of David Padilla, a Southern Pacific section employee. Some other man, whose name he did not mention, accompanied him. Padilla met Carbajal in Stockton and did not recognize him as the man who was with the defendant at Modesto. He may have accompanied the defendant to Modesto. The defendant left that evening, saying he was going to Stockton to get a tire. He drove back to Modesto alone early the following morning, remaining only fifteen minutes, and then left his car in the possession of Padilla, saying he was going to Los Banos to pick cotton. He left Modesto that day and beat his way on a freight train to Los Angeles. The defendant claims to have stopped at various places on the way seeking employment and asserts that he did not arrive at Los Angeles until Friday night. That is not true, for his friend Padilla received a postcard from him, dated at Los Angeles, Thursday, November 9th, asking him to "Do me the favor of covering my car with a linen and just as soon as I can call for it, if God wills it, I will." He had a mother, father, a brother and a sister at Los Angeles, yet he did not let them know of his presence. The defendant was arrested by Los Angeles officers November 28th. He was found hiding in a little shack at the rear of the home of a friend by the name of Solice at 1257 Medford street at the outskirts of the city. He made a voluntary statement to the officers concerning the homicide and his conduct, which contains many assertions conflicting with other admissions subsequently made by him. Among other significant circumstances, he admitted he was wearing his brown suit of clothes on Sunday when they drove to the willow patch where the deceased was killed. When he was asked where that suit of clothes was he said he bought a suit case at Modesto and placed the suit and other belongings in it and shipped them to his own address at Los Angeles; that he received the suitcase, but that someone afterward stole it. If he murdered Jiminez in the bloody and gruesome manner that he was killed, that brown suit of clothes could scarcely have escaped from telltale stains. Indeed, the front cushion of his automobile contained a dark spot which an expert witness testified resembled blood.

The body of the deceased was not discovered until November 15th, ten days after the homicide occurred. Mr. Ray Muniz and his friend Mr. Denuit were hunting along the river bank and chanced to pass through the willow thicket on Rough and Ready island when they discovered the mutilated and partially decomposed body of Fortunado Jiminez and promptly informed the sheriff's office of their discovery.

The deputy sheriff and an assistant visited the premises at once and made a thorough investigation. They found the mutilated body of the deceased in a slight depression in the midst of the thicket about 75 feet from the point where the defendant afterwards said he parked his car. The head and face of the corpse were fearfully gashed. One hand was nearly severed at the wrist, hanging by a mere shred of skin or fiber. The other hand was completely severed and was found some distance from the body. The clothing was cut and slashed in many places and saturated with blood and dirt. There was a spot some distance from the body that was soaked with blood. The adjacent leaves and shrubbery bore evidence of bloodstains. The beet knife was found some distance away. It contained dark stains resembling blood, and several human hairs and woolen fibers similar to those of the jacket worn by the deceased. The handle was covered with a substance that resembled blood. The jacket had been cut in several places.

A few days later the sheriff's office was notified of the Ford automobile which was parked in Padilla's yard at Modesto. The car was recovered and identified as the property of the defendant. The cushion of the front seat contained a spot which resembled blood. The speedometer had a spot which was positively declared to be blood. The beet knife was conclusively proved to be the same one owned by the defendant and seen in his automobile two or three days before the homicide.

The defendant was arrested in Los Angeles and returned to Stockton.

At the trial Doctor John Rosasco, whose qualifications were admitted, and who performed an autopsy on the body of the deceased ten or twelve days after his death occurred, testified that Jiminez died from hemorrhage and shock; that he found:

> "About six lacerations on the left side of the scalp, varying in length from one puncture wound which had penetrated into the brain some inch and a half to the longest laceration which was about six inches long. These all penetrated into the periosteum. * * * There was a laceration in which the auricle was almost completely bisected; * * * The face presented a wound, * * * it appeared to course downwards toward the chin, it may have been related or caused by the same instrument that caused the perforation of the skull. The chest cavity, about two and a half inches from the left nipple, at about the same level, showed a small irregular wound, approximately the same size as the one in the head, that penetrated inward into the lung, a distance of about an inch and a half or two inches. * * * There was free blood in the pleural cavity. * * * There was an absence of the right hand, it had been severed through the wrist by something apparently quite sharp. There was a laceration through the ulna side of the right arm, about midway between the wrist and the elbow. The left hand * * * was reversed backwards and hanging by a little more than the skin on the back part. Then there was a wound about six inches from the left elbow which had fractured both bones of the forearm; this was surrounded by several similar lacerations which were not nearly as deep. * * * In addition to that he presented several small contusions and abrasions about both lower legs."

When the doctor was shown the beet knife and asked, without objection, if such wounds as he found on the body of the deceased could be produced by that weapon, he replied: "The instrument is quite heavy and has a sharp edge which the instrument of death must perforce have had; and there is also the factor of how viciously it had been handled."

The evidence amply supports the verdict and judgment of conviction. The record precludes any reasonable theory other than that of the guilt of the defendant. It was a fiendish and atrocious murder. It was committed with the defendant's beet knife which was seen in a very accessible place in his automobile a few days before the homicide. He had previously quarreled with his wife and planned to leave home. He admits driving the deceased in his automobile and parking it in a secluded spot at the margin of the dense willow thicket within 75 feet of the place where the body was hidden. His knife with which Jiminez was murdered was found hidden or thrown away in the same copse near the body. It is not reasonable to assume Jiminez was led into the jungle by another person and quietly slaughtered in ten minutes' time within 75 feet of where the defendant says he was changing his tire, without his hearing and knowing of the affray which must have created an unusual disturbance. In spite of the defendant's story to the contrary, satisfactory evidence was adduced that Carbajal was not with them on that death journey. The defendant immediately fled from Stockton, destroyed the clothing which he wore at the time of the homicide, and hid in a shack at the outskirts of Los Angeles. Blood, human hairs and woolen fabric from the jacket of the deceased were found on the fatal knife. Blood was also found on the speedometer of his machine and a spot "resembling blood" was also found on the cushion of the front seat. His numerous statements are irreconcilably conflicting and unbelievable.

There is no error in the challenged rulings of the court receiving or rejecting evidence in the course of the trial. The appellant makes twelve assignments of such alleged errors. We are of the opinion none of them has substantial merit.

[2] The appellant argues that it is conceded the wound which penetrated the lung of the deceased was not inflicted by the beet knife, but that upon the contrary it is apparent some other weapon which was not produced at the trial caused that fatal wound. We are pointed to no admission in the record to that effect. The evidence appears contrary to that assertion. After describing the various wounds in detail, including the one referred to in the chest, Doctor Rosasco was shown the beet knife and asked, "Would such an instrument be one likely to produce the wounds you described?" To this question he replied, "It would be possible." He was then asked, "And why do you say that, Doctor?" And he replied, "Well, the instrument is quite heavy and has a sharp edge which the instrument of death must perforce have had." We construe this language to mean that the doctor believed the chest wound was inflicted by the beet knife. But it is

immaterial whether it was so inflicted or not. It does satisfactorily appear that an assault was made on the deceased with the defendant's beet knife, for it contained not only blood and human hairs on its blade, but also woolen fabric which matched the cloth jacket the deceased wore when he was killed. We may not assume the chest wound was the only fatal wound which he received. There was also a wound an inch and a half in length which "penetrated into the brain"; both bones of the forearm were fractured, and both hands were severed "by something apparently quite sharp". The doctor said the wound which penetrated the lung about an inch and a half, being the same depth to which the weapon penetrated the brain, was also "approximately the same size as the one in the head". Evidently the doctor believed all the wounds were inflicted by the same weapon. There is ample evidence to prove that the beet knife was used upon the victim, which is material to show that the defendant was the assailant. It is immaterial that the assailant may have also used another weapon to inflict a chest wound which would have also proved fatal.

[3] The court did not err in admitting in evidence the seat of defendant's car, upon the cushion of which there was a dark stain which Mr. Hill testified "might be blood". He was first qualified as an expert on that subject by proof of seventeen years' experience in such matters in the sheriff's office. He did not say definitely the spot was caused by blood. We assume the jurors had a right to look at it and decide for themselves whether it was caused by blood. They were the exclusive judges of the weight of the evidence, and were so instructed. The automobile, including the front seat thereof, was competent evidence. They were employed in the perpetration of the crime. At least, the admission of the seat in evidence was harmless.

[4] The speedometer was properly admitted in evidence. It was a part of the machine used in the commission of the homicide. It contained a spot which was positively identified by the expert witness as blood.

[5] Certain willow leaves which were found in the drip-pan of the automobile, similar to the leaves on the willow trees in the thicket where the body of the deceased was concealed, were admitted in evidence. Since willow leaves are similar in appearance and common to the San Joaquin river and almost every other California stream, it appears that the evidence is of no value. But it is harmless. It was offered to show that the defendant was actually in the immediate vicinity of the willow thicket. He admitted that fact. He showed the officers exactly where he parked the machine within 75 feet of the spot where the body was found.

[6, 7] The court did not err in admitting the statement of the defendant testified to by the officer Romero, without first requiring proof that it was voluntarily made without an offer of reward or a threat of punishment. It was in no sense a confession. The statement contains no admission of guilt on the part of the defendant. He constantly asserted his innocence, and declared that his companion Carbajal disappeared with the deceased in the thicket, and soon came running back and said, "I just killed a s-of-a-b, let's get out of here." The statement was offered as mere admissions of facts, and not as a confession. No preliminary showing of the voluntary nature of a statement is necessary when it amounts to only admission of facts as distinguished from a confession. People v. Connelly, 195 Cal. 584, 234 P. 374; People v. Wright, 26 Cal.App.2d 197, 79 P.2d 102; People v. Barr, 134 Cal.App. 383, 25 P.2d 503; People v. Ramos, 3 Cal. 2d 269, 44 P.2d 301; 8 Cal.Jur. 115, sec. 205.

[8, 9] The court did not err in sustaining objections to the defendant's attempt to prove by the witness Mr. Cakebread, for whom the defendant had once worked, the hearsay and self-serving statements alleged to have been made by the defendant and his brother, who lives in Los Angeles, that the only reason the defendant did not let his parents and relatives know of his presence in Los Angeles was because they condemned his living with a woman without marrying her. These statements were solicited to rebut the theory of defendant's flight from Stockton after the homicide. Mr. Cakebread's evidence of what he may have heard a relative of the defendant say in that regard was hearsay and incompetent. What the witness may have heard the defendant say in that regard was self-serving and incompetent. Moreover, the defendant fully testified to all that was sought to be elicited from Mr. Cakebread in that regard. The rejected evidence regarding the defendant's effort to borrow money from the witness to repair a tire is harmless.

[10-13] The court did not err in admitting photographs of the willow thicket and the vicinity where the body was found, the beet knife in the spot where it was discovered, and the defendant himself at the point where he voluntarily showed the officers he had parked his automobile at the time of the homicide. The defendant freely admitted that he had taken the deceased in his automobile to that desolate spot, and told them exactly where he parked his car. He voluntarily went with them to identify the spot. His picture was taken while he stood at that point where he said his machine stood. We do not see how that was prejudicial in view of the defendant's admissions. It added nothing to the admission which he had made in that regard. Nor was it prejudicial error to photograph the knife at the spot where it was found and to thereafter offer the picture in evidence. These photographs were received to show the nature of the surroundings where the homicide occurred. Courts are authorized to receive in evidence photographs in the same class as diagrams, when they accurately depict the locality of the crime, together with weapons, objects and physical conditions which are unchanged in status or in relation to other surrounding conditions as shown at the trial by accompanying testimony. People v. Phelan, 123 Cal. 551, 564, 56 P. 424; People v. Crandall, 125 Cal. 129, 132, 57 P. 785; People v. Mahatch, 148 Cal. 200, 203, 82 P. 779; People v. Grill, 151 Cal. 592, 598, 91 P. 515. The evidence in the present case conforms adequately to the above stated rule of law. The photographs were not prejudicial.

[14] The jury was definitely instructed upon all the necessary elements with respect to circumstantial evidence. The rejecting of defendant's proposed charge on that subject was therefore harmless. The intruction which was refused contained only the following principles of law, that the circumstances must show not only that the murder was committed, but also that the defendant himself was guilty of the crime; that the circumstances must be inconsistent "with any other rational conclusion" and should "render probable the theory sought to be established by the prosecution" and "exclude to a moral certainty every other theory but the single one of guilt". That rejected instruction was taken from the case of People v. McClain, 115 Cal.App. 505, 1 P.2d 1085, upon which the appellant relies for reversal. The case last cited was reversed because the "equivalent of the rejected instruction" was not given to the jury by the trial court. In the present case every necessary element of the rejected instruction was given to the jury in its charge. In this case the court did instruct the jury that the defendant was presumed to be a man of good character; that he was deemed to be innocent of the charge; that the jury could not base its verdict on "conjecture, speculation, guesses, passion or prejudice"; that the prosecution must prove the defendant's guilt "beyond a reasonable doubt and to a moral certainty". The usual and accepted definition of a reasonable doubt was given. The jury was then clearly informed that the law recognizes two classes of proof in criminal cases, namely, direct and circumstantial evidence; that in the latter class there must be proof "of a chain of circumstances sufficiently strong" to show "the commission of the crime by the defendant". That instruction, which was given to the jury, then concluded as follows: "In order to convict on circumstantial evidence, there should be produced the same degree of certainty as that which arises from direct testimony and excludes all rational probability of innocence. The circumstances should be of such a nature as not to be reasonably accounted for on the theory of the defendant's innocence, but perfectly reconcilable with the theory of the defendant's guilt."

[15] The rejected instruction was therefore sufficiently covered by other ones which were given to the jury, and its refusal was not erroneous. The frequent repetition of principles of law in the court's charge is often confusing and harmful. In the interest of brevity and clarity, the charge to the jury should be as concise as may be consistent with the issues necessarily involved and the protection of the rights of the accused person.

That deleted portion of defendant's instruction which declares the laws are made for the protection of the innocent as well as for punishment of the guilty was elsewhere clearly given to the jury in other instructions. The omitted portion merely reiterated the principle that the defendant could not be convicted unless the jury was "fully satisfied" of his guilt.

[16] It was not error to reject the defendant's proposed instruction to the effect that the good character of the defendant, if it was satisfactorily established, should

be considered by the jury throughout its deliberations, and that if they entertained a reasonable doubt of his guilt this evidence of his good character would be sufficient ground for his acquittal. This instruction is the converse of a similar one which was taken from People v. Mitchell, 129 Cal. 584, at page 587, 62 P. 187, 188. In the last-mentioned case the jury was instructed that in spite of the established previous good character of the accused person "if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character". The only portion of the instruction in the Mitchell case which was criticized by the appellant or considered by the court on appeal, was the language above quoted. The balance of that instruction was not involved on that appeal. In that case the defendant was convicted of murder, and the judgment was affirmed.

In the present case every essential element of the rejected instruction was given in other instructions to the jury. The court charged the jury that "The character of the defendant is presumed to be good"; that they could not convict him unless they were satisfied from all the facts and circumstances of the case that he is guilty "beyond a reasonable doubt and to a moral certainty". Moreover, the challenged instruction is argumentative and therefore objectionable.

[17, 18] The appellant also complains of the refusal to give his proposed instruction number 14, which also informs the jury they must take into consideration the good character of the defendant in determining his guilt or innocence. It then discusses the reasons why such evidence of good character should be considered, concluding with the statement that evidence of good character is competent on the theory "that there is some mistake or misrepresentation in the evidence on the part of the prosecution". We are of the opinion the essential part of this instruction was also sufficiently covered by others which were given to the jury on the general charge. In spite of the fact that the giving of the same instruction was held in the case of People v. Ridgeway, 89 Cal.App. 615, 265 P. 349, not to constitute reversible error, and that the court failed to consider or discuss the argumentative character of the charge, we are convinced it is objectionably argumentative. The trial court should not unfairly cast suspicion upon the character of the evidence of either the prosecution or the defense by intimating that it might contain "mistakes or misrepresentations". At least the jury was informed in other instructions that it should consider every essential fact and circumstance in the case, and acquit the defendant unless it was fully satisfied of his guilt. The refusal to give that instruction was not prejudicial or erroneous.

Defendant's instruction number 16, the refusal of which is assigned as error, was fully covered by instruction number 10, which was given, on the subject of the alleged absence of proof of a motive for the crime on the part of the defendant. The jury was correctly instructed that if the guilt of the defendant was completely established, the lack of proof of a motive for the crime was "unimportant"; that when a doubt of the defendant's guilt is entertained, proof of the presence or absence of a motive becomes valuable and should be considered; that motive may be shown by positive evidence or by surrounding circumstances, and finally that absence of proof of a motive "is equally a circumstance in favor of the accused to be given such weight as the jury deems proper". That instruction is not criticized by the appellant. It is approved in People v. Garcia, 2 Cal.2d 673, 683, 42 P.2d 1013; People v. Durrant, 116 Cal. 179, 208, 48 P. 75, and the essential elements are supported in the text of 8 California Jurisprudence, page 329, section 377.

[19, 20] The district attorney was properly permitted to cross-examine the witness, Mr. Cakebread, who had testified that the defendant previously bore the reputation of being a "peaceful and law-abiding citizen", as to whether he knew the defendant was a paroled prisoner from San Quentin; that he subsequently pleaded guilty to a charge of "car prowling" in Stockton and served a sentence of 180 days in the city prison. It is not disputed that both of those convictions against the defendant occurred. They tended to refute the claim that he had a good reputation as a law-abiding citizen. The witness admitted he had heard of neither conviction but insisted that he still believed his reputation in that regard was good "under the conditions that I knew him". Evidently the witness understood the question to refer to his personal opinion of the defendant's character as distinguished from his general reputation. The cross-examination by

the prosecuting officer in that respect was evidently conducted in good faith. The rule is well established that, in the absence of bad faith, a witness who has sworn to the good reputation of an accused person for peace and quiet or for truth, honesty and integrity, may be asked on cross-examination whether he knows of and takes into consideration specific acts and conduct inconsistent with the reputation attributed to him, when such acts actually occurred or when the examining attorney, in good faith, believed that the defendant was guilty of them. People v. McKenna, 11 Cal.2d 327, 335, 79 P.2d 1065; People v. Stevens, 5 Cal.2d 92, 99, 53 P.2d 133.

[21] The jury was not precluded from fairly considering the question as to whether it should find the defendant not guilty on account of the failure of the court to first include among the forms of verdicts handed to it, one drawn on the theory of his innocence. The defendant was not prejudiced by that omission. That form of verdict was given to the jury before it began consideration of the evidence. The record clearly shows that after the evidence was closed and the arguments completed, the court informed the jurors with respect to various forms of verdicts which they should consider. The court said: "If after a consideration of all the evidence in the case, the jury entertain a reasonable doubt as to defendant's guilt, then I charge you it will be your duty to acquit him."

The court then read and handed to the jury the various forms of verdicts, omitting the one of acquittal, which was overlooked. After formal instructions regarding the selection of a foreman, agreeing upon a verdict by unanimous vote and the signing of that verdict by the foreman, they were directed to retire and consider their verdict. It does not appear that the jury had even retired from the court room. The record merely shows that the case was submitted to the jury at 9:50 o'clock a.m. and at 9:55 the court reconvened and said: "When the court was instructing the jury as to the form of their verdict, inadvertently I omitted to read you one with reference to not guilty. Should the jury conclude that the defendant is not guilty, then the following shall be the form of your verdict."

[22] That form of verdict was then read and handed to the jury. The jury was then told to retire and to enter upon its deliberations. In the absence of a showing to the contrary, we must assume all proper forms of verdicts were placed in the hands of the jury before it actually began its deliberations or consideration of the guilt or innocence of the defendant. But even though the jury did retire and was recalled into court and given the verdict of not guilty within five minutes after it retired, the defendant could not possibly be prejudiced thereby. People v. Woods, 147 Cal. 265, 273, 81 P. 652, 109 Am.St.Rep. 151.

The defendant was accorded a fair and an impartial trial. There appears to have been no miscarriage of justice.

The judgment and the order denying a new trial are affirmed.

We concur: BRUTON, Justice pro tem.; TUTTLE, J.

33 Cal.App.2d 297

## PEOPLE v. MIROPOL.

Cr. 3201.

District Court of Appeal, Second District, Division 2, California.

June 8, 1939.

**1. Gaming 🔑98(2)**

Evidence, including evidence corroborating testimony of an alleged accomplice, sustained conviction of receiving, holding, or forwarding money to be wagered on a horse race. Pen.Code, § 337a, subd. 3.

**2. Criminal law 🔑829(3)**

Refusal of requested instruction setting forth entire language of statute relating to receiving, holding, or forwarding money to be wagered on a horse race, which accused was charged with having violated, was not prejudicial error where court fully informed jury in other instructions concerning the offense. Pen.Code, § 337a, subd. 3.

**3. Criminal law 🔑507(8)**

A witness who testified that he placed bets with accused, who was convicted of receiving, holding, and forwarding money to be wagered on a horse race, was not an "accomplice" of accused so as to require corroboration of witness' testimony in order to sustain conviction. Pen.Code, § 337a, subd. 3.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Neal Miropol was convicted of receiving, holding, or forwarding money to be wagered on a horse race, and he appeals.

Affirmed.

Goldman & Goldman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen. and Paul McCormick, Deputy Atty. Gen., for the People.

WOOD, Acting Presiding Justice.

Defendant was charged with the violation of section 337a, subdivision 3, of the Penal Code. He was found guilty by a jury and appeals from the judgment of conviction.

[1] Defendant's contention that the verdict is not supported by the evidence is without merit. Evidence presented by the prosecution established that on December 2, 1938, defendant was receiving money to be wagered on horse races in the vicinity of the intersection of Logan street and Sunset boulevard in the city of Los Angeles. Police officers who were in close proximity to the intersection testified that several cars were parked adjacent to a garage and filling station; that defendant made visits to the occupants of the cars and then went to the garage. Defendant made several trips to one of the cars, the occupant of which being later identified as Guy Price. Defendant handed something into the car, after which he took a piece of paper from his pocket and made a notation upon it. The officers testified that they saw something pass which resembled money. After making the notation on the paper defendant walked back to the garage where the officers found several papers generally used in placing bets on horse races, among them a paper marked "National Scratch Sheet". Defendant admitted that he was the owner of these papers. Although he stated that he had been without employment for about two months, he had about three hundred dollars on his person. Guy Price testified that he placed several bets with the defendant on the occasion in question giving the names and numbers of the horses, and that he had given money to defendant for this purpose.

[2] Defendant complains of the failure of the trial court to read to the jury a requested instruction which was a complete copy of subdivision 3 of section 337a of the Penal Code. The jury was fully informed in other instructions concerning the offense with which defendant was charged. He suffered no prejudice by the refusal of the court to set forth the entire language of the code subdivision.

[3] Defendant also complains of the refusal of the trial court to give an instruction on the subject of accomplices. In this the court did not err. The witness Price was not an accomplice. He could not have been convicted of the offense for which defendant was on trial. Price did not "receive, hold or forward" money to be wagered on a horse race as contemplated by the penal statute in question. Moreover, the evidence was unquestionably sufficient to corroborate the testimony of Price.

Defendant's claims of errors in the rulings of the trial court on the admissibility of evidence are without merit.

The judgment is affirmed.

I concur: McCOMB, J.

---

33 Cal.App.2d 287

## HAYDEN v. PARAMOUNT PRODUCTIONS, Inc., et al.

Civ. 11801.

District Court of Appeal, Second District, Division 1, California.

June 8, 1939.

As Modified on Denial of Rehearing July 7, 1939.

Hearing Denied Aug. 7, 1939.

**1. Electricity 🔑16(7)**

**Master and servant 🔑139, 320**

Where city owned electric wire which was suspended 45 to 50 feet from ground and was attached to pole which leaned 8 inches at a point 28 feet from ground and which was located on right of way obtained from corporation, and an employee of a subcontractor which was engaged in work on building being constructed for the corporation was injured when crane operated by a fellow employee contacted the electric wire which was in plain view and was suspended between poles to which were attached warning signs, the "proximate cause" of employee's injury was negligence of subcontractor's employees and not negligence on part of city, corporation, or contractor.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

**2. Electricity ⚷19(3)**

In action for injuries sustained when a crane came into contact with an electric wire, court would assume that wire was maintained at required height above the ground, in absence of an allegation and proof that wire was maintained in violation of rule of law or regulation of an authorized governmental body or commission.

**3. Electricity ⚷15(1)**

An employee of subcontractor which was engaged in work on building being constructed for corporation was not an "invitee" of city which owned electric wire located on right of way obtained from the corporation, as respects liability of city for injuries sustained by the employee who was injured when a crane contacted the city's electric wire.

**4. Electricity ⚷15(1)**

Even if plaintiff who was injured when a crane came into contact with city's electric wire was an "invitee" of city, the city was obligated to employee only to keep the power line in safe condition.

**5. Electricity ⚷19(5)**

In action for injuries to employee of subcontractor which was engaged in construction of building for corporation, sustained when a crane contacted electric wire of city located on city's right of way on premises owned by the corporation, evidence failed to show that city failed to use reasonable and ordinary care in erection and maintenance of power line.

**6. Negligence ⚷62(1)**

A prior and remote cause cannot be made basis of action if such cause did nothing more than furnish condition by which injury was made possible and there intervened between such remote cause and the injury a distinct successive, unrelated, and efficient cause of the injury, even though the injury would not have happened but for the condition, and if no danger existed in the condition except because of the independent cause, the condition was not the "proximate cause" of the injury.

**7. Negligence ⚷62(1)**

Where an independent negligent act or defective condition sets into operation the circumstances which result in injury because of a prior defective condition, the subsequent independent act or condition is the "proximate cause" of the injury.

**8. Negligence ⚷4**

"Ordinary and reasonable care" is such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances in order to prevent injury.

[Ed. Note.—For other definitions of "Ordinary Care" and "Reasonable Care," see Words & Phrases.]

**9. Electricity ⚷14(1)**

A party maintaining a highly charged electric wire which is a "dangerous instrumentality" is not required to anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with the wire resulting in injury or even death, reasonable care and not insurance against every possible accident being the measure of liability.

[Ed. Note.—For other definitions of "Dangerous Instrumentality," see Words & Phrases.]

**10. Electricity ⚷19(5)**

In action for injuries to employee of subcontractor which was engaged in construction of building for corporation, sustained when a crane contacted electric wire of city located on city's right of way on premises owned by the corporation, evidence that corporation had some guy wires and wooden braces connected with pole which leaned slightly was insufficient to connect the corporation with the leaning position of the pole, on which the employee attempted to predicate negligence.

**11. Electricity ⚷16(1)**

In action for injuries to employee of subcontractor which was engaged in construction of building for corporation, sustained when a crane contacted electric wire of city located on city's right of way on premises owned by the corporation, the employee could not predicate negligence on part of corporation because of its alleged refusal to permit city to replace a leaning pole with a taller one where the city had right of way entitling it to enter upon corporation's property and do such work as the city might deem necessary for proper maintenance of the power line.

**12. Electricity** ⚿16(1)

Corporation for which building was being constructed had no duty to warn employee of a subcontractor of any danger because of existence of high-voltage electric wires on corporation's premises, where the wires were open to view and presented patent danger by reason of common knowledge of fact that such wires are "dangerous instrumentalities."

**13. Negligence** ⚿32(1, 2)

Corporation for which building was being constructed was "invitor" of employee of a subcontractor, and by exercising ordinary care in its conduct, discharged obligation, as an invitor, to the employee.

**14. Negligence** ⚿32(2), 55

Contractor and subcontractor were "invitees" of corporation for which they were constructing building, but as between each other contractor and subcontractor were strangers, owing to employees of each other the same duty of exercising ordinary care for their safety during progress of work as contractor and subcontractor owed to the public generally.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

**15. Negligence** ⚿55

Foundation for prima facie liability of a general contractor to an employee of an independent contractor is some wrongful act committed by the general contractor or his servant after the latter has arrived upon the premises and during the actual progress of the work to be done by the general contractor.

**16. Master and servant** ⚿320

Contractor was not liable for injuries to subcontractor's employee which resulted from fact that crane brought upon the premises by subcontractor and operated by the employee's fellow servant contacted electric wire located near the premises on which the work was performed.

**17. Master and servant** ⚿330(2)

In action for injuries to employee of subcontractor which was engaged in construction of building for corporation, sustained when crane contacted electric wire of city located on city's right of way on premises owned by corporation, exclusion of order of Industrial Accident Commission prohibiting employers from requiring employees to perform any function in proximity to high-voltage line, which was offered as against contractor, was proper in view of fact that the contractor was not the employer of the employee nor an "agent" of the subcontractor.

[Ed. Note.—For other definitions of "Agent," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by J. R. Hayden against Paramount Productions, Incorporated, and others, for injuries sustained by electric shock, allegedly caused by the negligence of defendant. From orders granting motions of nonsuit at close of evidence for plaintiff and from judgment for defendants, plaintiff appeals.

Attempted appeals from orders dismissed, and judgment affirmed.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent Paramount Productions, Inc.

Lasher B. Gallagher, of Los Angeles, for respondent E. S. McKittrick Co., Inc.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Kenneth K. Scott and Everard L. McMurrin, Deputies City Atty., all of Los Angeles, for respondents City of Los Angeles and Department of Water and Power.

WHITE, Justice.

This is an action by plaintiff to recover damages for personal injuries alleged to have been sustained by and through the negligence of the defendants. Upon the trial a nonsuit was granted at the close of the evidence for plaintiff and judgment entered for the defendants, from which the plaintiff appeals. The attempted appeals from the "order and orders of non-suit, * * * granting the several motions of nonsuit on behalf of defendants" are dismissed, for the reason that the questions presented by them will be decided upon the appeal from the judgment.

The main ground upon which the motion for nonsuit was made and granted was that negligence on the part of the defendants contributing proximately to the injury sustained by plaintiff did not appear. The facts as disclosed by the evidence are: The defendant City of Los Angeles and Department of Water and Power (hereinafter designated as the city) is and for years past has been engaged in the business of supplying its inhabitants with electric energy. On November 22, 1922, the city procured a right of way for the erection and maintenance of poles, wires and necessary fixtures on and over the northerly side of certain property belonging to defendant Paramount Productions, Inc. (hereinafter referred to as Paramount). Pursuant thereto, the city, in the year 1923, erected the original electric line on and over this right of way, where it has remained continuously except for some replacement of poles. The Paramount property contains approximately twenty-six acres and is located in the city of Los Angeles. On November 15, 1935, defendant E. S. McKittrick Company, Inc. (hereinafter called McKittrick), agreed in writing to construct a general storage building for Paramount upon the aforesaid property. Construction work on the building was actually begun in the latter part of November, 1935, and in order to clear the area that the storage building was to occupy it was necessary to move the city's power poles eighteen or twenty inches farther north or nearer the property line. Pursuant to Paramount's request, the city, on December 10, 1935, replaced one of the poles, and was not again notified to make further pole changes until four months later, or in early April, 1936, at or about which time another pole was replaced. On the day of the accident one of the newly installed poles leaned somewhat to the south, the evidence showing that the base of the pole was fifteen inches north of the north building line of the new building, and at a point approximately twenty-eight feet above the ground level of the new building the pole was approximately seven inches from the north wall of such new building. In other words, the pole leaned to the south eight inches at a point twenty-eight feet from the ground. The electric wires supported by these poles constituted a high voltage line, and the conductors or wires of said line carried voltage of 33,000 volts. On each cross-arm of the two poles with which we are here concerned there were signs reading "High Voltage", each of which was plainly visible.

Pursuant to an assignment of a subcontract, the structural steel of the storage building was erected by Bethlehem Steel Company, who was not a party to this litigation. Employees of the last-named company commenced the steel work on the second unit of the warehouse on Monday, April 20, 1936. The appellant, J. R. Hayden, was one of these employees. During the next four days, or until the time of his injury about four o'clock in the afternoon of Thursday, April 23, appellant Hayden assisted in erecting steel from the ground up, and he observed the city's electric lines the first day he was on the job. On the aforesaid afternoon, appellant, concededly an employee of Bethlehem Steel Company, the subcontractor, was injured through contact with the city's electric power line, at which time he was engaged with fellow employees in the installation of one of a row of steel columns. These columns were raised and moved into place by a mechanical device known to the trade as a crane or "whirly". Briefly described, it consisted of a long steel boom mounted on a truck, with cables that ran from a drum along the boom and through sheaves or pulleys at its upper end, and then down to the object to be moved. The crane could turn a complete circle; its boom could be raised and lowered at an angle of ninety degrees; and the cables could be drawn in and extended as conditions required. At the time of the accident the crane was standing about twenty to twenty-two feet south of the north line of the building. Column number three had just been picked up from a position on the ground along the westerly side of the crane after appellant Hayden had affixed a sling or choker to the column about three feet from its upper end and had hooked the load block from the crane into this sling. The column was then raised by the crane so that it hung from the boom in a vertical position, its lower end being about three feet above the ground. The crane was operated by an employee of Bethlehem Steel Company. The operator, by a counter-clockwise movement of the crane, caused the column to be swung or carried toward the concrete base upon which it was to be set in the north wall of the building. Continuously during this operation appellant held on to the column, his hands being placed about one foot from its lower end as he guided it toward the aforesaid base. While being thus operated by appellant's fellow employee, the boom, in its northerly and upward course, came into close proximity to or contact with the city's lowest high tension wire on the south side of the power poles, as a result of which appellant received his injuries, consisting of electric shock and burns.

It was estimated that the boom was capable of reaching a height of from forty-three feet to more than fifty feet. Regardless, however, of its precise measurement, it is obvious that the boom could and did reach as high as the overhead electric wire with which it made contact, and which wire was approximately forty-five to fifty feet above the ground at the point of contact.

[1] It is at once apparent from the foregoing facts that the proximate cause of plaintiff's injuries was not any negligence on the part of the defendants, but was primarily and proximately attributable to the negligence of appellant's employer, Bethlehem Steel Company, whose foreman set the crane in a position where it could touch or come in dangerous proximity to the high voltage wires which were in plain view and to which were attached warning signs, and whose other employee, the operator of the crane, operated it in such a manner as to bring it so close to the high voltage wires, with knowledge of both the proximity and danger of such wires, that it grounded an electric current, resulting in injury to appellant.

[2-7] Appellant contends, however, that the respondent city was negligent in maintaining out of alignment its poles which supported the power line and in permitting them to lean in the direction of that part of the premises upon which appellant was working, as a result of which, it is contended, the power lines were sagging unreasonably and in dangerous proximity to such premises and to the crane or derrick about which appellant was working. There was no substantial evidence that the wires were sagging to a point where they were in dangerous proximity to the premises. The wires had a safe clearance, under the circumstances here presented, of more than forty-five feet above the ground, and the city was fortified with a right of way over which it was entitled to maintain the wires. In Simons v. Pacific Gas & Elec. Co., 64 Cal.App. 74, 220 P. 425, it was held not to be negligence as a matter of law for a power company to maintain its lines with leaning poles which are rigidly fixed or to string wires twenty-eight feet ten inches above the ground or to maintain its line within seven feet of the well and derrick of a rancher. In the absence of an allegation and proof that wires were maintained in violation of a rule of law or a regulation of an authorized governmental body or commission, it must be assumed that they were maintained at the required height above the ground. Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 23 P.2d 1068. There was no evidence to support appellant's claim that the city caused him to be and to become in contact with the high voltage electric line. Neither appellant nor the operator of the "whirly" were in the employ of the city, and the latter had no control over either. Indeed, the record is barren of any evidence that the city even had knowledge of the work appellant was doing at the time of the accident. The latter was not an invitee of the city, but if it be conceded that appellant was an invitee of the city, the latter was obliged only to keep the premises in safe condition; and as heretofore noted, the evidence failed to show that the city failed to use reasonable and ordinary care in the erection and maintenance of its power lines. There was no contractual relation between the city and appellant or his employer. The work in which appellant was engaged at the time of his injury had no relation to the business of respondent city. Manifestly, the city could not reasonably be expected to anticipate that any one would project a boom or "whirly", working near its right of way, to an elevation of more than forty-five feet and contact an electric wire, thereby causing the current to ground, when, as here, the operator of the "whirly" knew of the presence of the wires and was apprised of their dangerous voltage through appropriate signs attached to the cross-bars on the poles. The proximate cause of this accident rests upon the Bethlehem Steel Company, whose employee misjudged distance and projected the end of the boom over forty-five feet in the air, causing the boom to come in contact with or in proximity to one of the city's electric wires, thereby grounding the same, notwithstanding knowledge of the location of the wires and notice of their dangerous voltage. The law in this regard is explicitly stated in the case of Stackpole v. Pacific Gas & Elec. Co., 181 Cal. 700, 186 P. 354. As was said in Hauser v. Pacific Gas & Elec. Co., supra [133 Cal.App. 222, 23 P.2d 1070], quoting from 45 Cor.Jur. 931:

"'A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause.'

"From the complaint it appears that plaintiff knew of the dangerous character of the wires and their exact location and condition, and deliberately moved a derrick into them and was injured. From the foregoing, it appears the complaint and the amended complaint failed to set forth any cause of action."

See, also, Sweatman v. Los Angeles Gas & Elec. Corp., 101 Cal.App. 318, 281 P. 677.

[8, 9] The standard of ordinary and reasonable care was attained by the city so far as its conduct is here concerned, for this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided, and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. It is not required under the law that one who maintains even so dangerous an instrumentality as a highly charged electric wire shall anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with such wire, resulting in injury or even death. Reasonable care, not insurance against every possible accident, is the measure of liability.

[10-12] As to respondent Paramount, appellant urges negligence on the grounds that the former caused one of the poles to lean off perpendicular; that it refused to permit the city to replace such poles prior to the happening of the accident; that Paramount failed to warn appellant of the danger of the high power lines; and finally, that Paramount neglected to make the premises safe for appellant to work upon. These claims cannot be upheld. The only evidence connecting Paramount with the leaning position of the pole was that the latter had some guy wires and wooden braces connected between a moving picture set and the pole, but one is left to surmise and conjecture to find any causal connection between the attachment of the guy wires and braces and the leaning of the pole, for the record is bereft of any evidence indicating that the attachments were responsible for the pole's leaning some twelve to fourteen inches. What we have heretofore said with reference to predicating negligence upon the leaning of the pole is applicable here. Simons v. Pacific Gas & Elec. Co., supra. Appellant's contention that Paramount was guilty of negligence by reason of its alleged refusal to permit the city to replace the leaning pole with a taller pole is without merit for two reasons: (1) the city had a right of way along Paramount's property which entitled it to enter thereon and to do such work as the city might deem necessary for the proper and safe maintenance of the high voltage power lines, and (2) for the reasons heretofore given in discussing this appeal as to the city, there rested upon the latter no obligation to install a taller pole, and its failure so to do was not negligence proximately contributing in any way to the injury sustained by appellant. It was not incumbent upon Paramount to warn appellant of any danger, because the high voltage wires were open to view and presented a patent danger by reason of common knowledge of the fact that power lines such as the one here in question are dangerous instrumentalities, and ordinary prudence dictates that one situated as were appellant and his fellow employees should refrain from exposing himself to the danger occasioned by contact with such wires. Bartuluci v. San Joaquin Light & Power Corp., 21 Cal.App.2d 376, 385, 69 P.2d 440; Stackpole v. Pacific Gas & Elec. Co., supra.

[13] Appellant's claim that no one had told him or the operator of the crane about the slope in the wires due to the leaning of the pole is unavailing, because the evidence discloses that both of these men as well as Mr. Reeves, the foreman for appellant's employer, Bethlehem Steel Company, who placed the crane in a dangerous position, could easily have seen the wires if only they looked. That they did not look seems incredible, in view of the fact that the foreman had warned the workmen to watch out for the wires. Appellant was

working for Bethlehem Steel Company and was under the direct supervision of the foreman, Reeves. If appellant personally was not warned of the danger lurking in the wires and was entitled to such warning, the responsibility to give it rested upon appellant's superior, Reeves, who admittedly had such knowledge, and not upon Paramount. Respondent Paramount, having no control or right to control the high power lines in any way because of the city's ownership and maintenance thereof, and having exercised ordinary care in its conduct, thereby discharged its obligation as an invitor to the appellant invitee. 19 Cal.Jur. 607.

[14] Coming now to a consideration of this appeal so far as respondent McKittrick Company is concerned, we find that the latter was a general contractor performing certain construction work for respondent Paramount. Bethlehem Steel Company, the employer of appellant and of all workmen in charge of the crane or "whirly", was an independent contractor. Each was there under contract to perform separate and distinct work on the building, independent of the other. As to the owner, respondent Paramount, they were each invitees, but as to each other they were strangers, between whom there was no privity of contract. Therefore they owed to the employees of each other the same duty of exercising ordinary care for their safety during the progress of the work as they owed the public generally. In Hall v. Barber Door Co., 218 Cal. 412, at page 419, 23 P.2d 279, at page 281, the Supreme Court said: "It cannot be doubted that an independent contractor is responsible to an occupant of a building rightfully on the premises at the request or consent of the owner *for any wrongful acts that may be committed by himself or his employees while the stipulated work is in progress and resulting in injuries to such occupant.* The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and control of the work, to see that the rights of other persons, rightfully on the premises, are not injuriously affected *by the performance of the work.* * * * Upon both principle and authority, it is clear that an independent contractor, who *by his own negligence* creates dangerous conditions *during the progress of the work,* should be held responsible for an injury occasioned by those conditions to one rightfully on the premises, and should be held liable for damage directly attributable to the failure to perform this duty." (Italics added.)

[15, 16] The proof contained in the record before us shows that appellant and the other workmen employed by the Bethlehem Steel Company had both notice and knowledge of the so-called dangerous condition. The true foundation for prima facie liability of a general contractor to an employee of an independent contractor is founded upon some *wrongful* act committed by the general contractor or his servants after the latter has arrived upon the premises and during the actual progress of the work to be done by the general contractor. If any dangerous condition existed in or about the premises, it was not brought about by the general contractor, respondent McKittrick, but was created when the independent contractor, Bethlehem Steel Company, brought the crane or "whirly" upon the premises, placed it in a position of proximity to the high voltage wires, and then, through one of its employees, a fellow servant of appellant, caused the boom to be raised into the air over forty-five feet into close proximity to the electric wires, thereby grounding an electric current, with resultant injury to appellant.

[17] Appellant next assigns as error the action of the trial court in excluding from evidence certain safety orders promulgated by the Industrial Accident Commission, appellant taking the position that the case comes within the general rule "that a violation of a statute or of a county or municipal ordinance, which directly causes injury to another, constitutes negligence as a matter of law". 19 Cal.Jur. 632, sec. 65. In this connection, appellant relies upon a violation of "Order 7-5050, Electrical Safety Orders, Industrial Accident Commission of the State of California", reading in part as follows: "No person, firm or corporation, or agent of same shall require or permit any employee to perform any function in proximity to high voltage lines." Assuming, without deciding, the right of the Industrial Accident Commission to regulate the conduct of employers and to prescribe regulations such as the one here referred to, no prejudicial error can be predicated upon the action of the trial court in the instant case; because the evidence in question was offered only as against respondent McKittrick Company, and the latter was not the employer of

appellant, nor was McKittrick Company an agent of appellant's employer. Obviously, only appellant's employer, Bethlehem Steel Company, could require or permit him to perform any function in proximity to high voltage wires. The evidence was properly excluded as to respondent McKittrick Company.

The record in this case demonstrates that the negligence of appellant's employer, Bethlehem Steel Company, was the sole proximate cause of this unfortunate accident. It follows that the nonsuit was properly granted as to all respondents.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

---

33 Cal.App.2d 274

## MOHR v. MOHR et al.

Civ. 10577.

District Court of Appeal, First District, Division 2, California.

June 8, 1939.

**1. Divorce 🔑231, 286**

In divorce action, where it is found that both parties have committed acts constituting grounds for divorce and have been living apart, and a divorce is denied to each on grounds of recrimination, trial court has power in its discretion to make an award to wife for her maintenance, and an award so made will not be disturbed on appeal except on a showing of abuse of discretion. Civ.Code, § 136.

**2. Divorce 🔑286**

On appeal on judgment roll alone, question whether trial court had power to award counsel fees to wife suing for divorce, though it was found that income and property rights of the spouses were identical, was not presented for review where there was nothing in record to show that income and property rights were identical, and findings made in order awarding fees showed that husband was able to engage in business and to pay a reasonable amount for fees.

**3. Appeal and error 🔑900**

All presumptions are in favor of the validity of an order of the trial court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Josephine K. Mohr against George L. Mohr and Frank Mohr for a divorce from George L. Mohr and to quiet title to certain property as against Frank Mohr, wherein George L. Mohr filed a cross-complaint. From that part of the judgment awarding plaintiff $100 per month for her support and from an order awarding plaintiff $1,100 as counsel fees, George L. Mohr appeals.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellant.

Myron Harris, of Oakland, for respondent.

SPENCE, Justice.

This is an appeal by defendant, George L. Mohr, upon the judgment roll, from that portion of the judgment in the above-entitled action by which plaintiff was awarded $100 per month for her support. Said defendant also appeals from an order awarding plaintiff the sum of $1,100 as counsel fees.

By her amended complaint, plaintiff sought a divorce from defendant George L. Mohr and also sought to quiet title to certain property as against defendant Frank Mohr. Defendant George L. Mohr filed an answer and cross-complaint and defendant Frank Mohr filed an answer. The judgment determined the property rights between the parties and no appeal has been taken from those portions of the judgment dealing with the property rights. However, the findings of the trial court with respect to the property rights of the spouses are discussed by the parties in arguing the questions presented here and reference will be made thereto in summarizing the findings.

The trial court found that defendant was chargeable with extreme cruelty toward plaintiff but also found that plaintiff was chargeable with extreme cruelty toward defendant. It was therefore decreed that neither spouse was entitled to a divorce.

The trial court further found that certain property was the community property of the spouses. This community property consisted of equities in two parcels of real property and some personal property. The net value of said community property was found to be not less than $4,000 nor more than $8,000. Each party was awarded an undivided one-half interest in said community property. It was further found that the spouses and defendant Frank Mohr, their son, were the owners, as joint tenants, of eight parcels of real property. The value of said property, over and above encumbrances, was found to be not less than $60,000 nor more than $120,000.

In the findings filed in support of the judgment, the trial court further found: "That plaintiff is of the age of fifty-six years or thereabouts, and not capable of supporting herself by her earnings. That defendant George L. Mohr is of the age of sixty-five years or thereabouts, was formerly engaged in the contracting and building business and retired from said business during the year of 1926, and since said time has been engaged solely in the business of operating, maintaining and repairing the joint tenancy properties hereinafter described. That defendant George L. Mohr is well able, out of the income and principal of his undivided one-third interest in and to said joint tenancy properties, to pay plaintiff the sums hereinafter awarded for her support and maintenance." The trial court concluded that plaintiff was entitled to $100 per month for her support and by the judgment ordered that defendant George L. Mohr "pay to plaintiff such sum as added to the income and proceeds received by plaintiff from the joint tenancy property hereinafter described will make a total of $100 per month".

A motion for counsel fees was made prior to the commencement of the trial, and a stipulation was made by the parties that the court might determine said motion after the presentation of all of the evidence in the trial of the action. At the close of the trial, the order was made awarding the sum of $1,100 as counsel fees. In making said order the trial court made findings that the joint tenancy property had at all times been managed, controlled and operated by defendant George L. Mohr; that plaintiff had no money or means to pay counsel fees without having recourse to the property in which she had but an undivided interest; that plaintiff was unable to earn money by employment and had no employment; that defendant George L. Mohr was capable of engaging in business and was engaged in managing and operating the community and joint tenancy properties and was "well able to pay plaintiff a reasonable amount" for counsel fees; and that $1,100 was a reasonable amount. It was ordered that said amount be forthwith paid by said defendant to plaintiff.

[1] The points made by appellant are found in two headings in appellant's briefs, which headings appear in the form of questions. The first is as follows, "Where it is found in a divorce action that both parties have committed acts constituting grounds for divorce and have been living separate and apart, and a divorce is denied to either on grounds of recrimination, does the court have power to award an allowance to the wife for her maintenance?" In our opinion the answer to this question is that the court has the power in its discretion to make an award to the wife under such circumstances, and that an award so made will not be disturbed on appeal except upon a showing of an abuse of discretion.

Section 136 of the Civil Code provides, "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them." This section and other sections relating to awards for maintenance are discussed in Broad v. Broad, 35 Cal.App. 646, 170 P. 658. The court there said 35 Cal.App. at page 647, 170 P. at page 659, "Under the language of these sections it appears that in a proceeding for divorce or maintenance the wife, if entitled to a divorce, may be awarded permanent alimony; and, on the other hand, even if a divorce be denied, still in the discretion of the trial court, if sound reason exist therefor, the husband may be compelled to provide for the support of his wife. Conditions may be such as not to entitle the wife to apply for a divorce, and yet the circumstances surrounding her marital life might be such as to render it obviously unjust to deny her all relief. Such, we think, might be the case where the wife was compelled to leave her home because of torment or insult suffered from her husband's relations living with them; or, if the husband had been guilty of all the grounds of divorce described in section 92 of the Civil Code except desertion, and upon a recriminatory plea in defense it was found that the wife had deserted him, and therefore could not be granted a divorce, the court could hardly send her back to live with her husband; and it would seem that under section 136, Civil Code, it might compel the husband to provide for her. Sweasey v. Sweasey, 126 Cal. 123, 128, 58 P. 456."

We are in accord with the construction placed upon said sections in the opinion in the Broad case and believe that said construction sustains the power exercised by the trial court in making the award here. Appellant concedes that the language of said section 136 contains no limitations on the court's power, and that the limitations, if any, must be found in the authorities. We find no authority directly holding that there is any such limitation as that contended for by appellant. Appellant cites and relies upon Mayr v. Mayr, 161 Cal. 134, 118 P. 546; Volkmar v. Volkmar, 147 Cal. 175, 81 P. 413; Hardy v. Hardy, 97 Cal. 125, 31 P. 906, and Hagle v. Hagle, 74 Cal. 608, 16 P. 518, but all of said cases appear to be distinguishable.

In the Mayr case, it appears that the husband was not guilty of extreme cruelty; that the parties had voluntarily separated without fault on the part of the husband; and that the wife was capable of earning her own living. In the Volkmar case the court assumed from the record that the parties had voluntarily separated as it was "not intimated by the findings in this case that the original separation between these parties was due to any fault of the plaintiff husband". [147 Cal. 175, 81 P. 414.] The Hardy case was concerned only with section 137 and in the Hagle case it was said 74 Cal. at page 612, 16 P. at page 519, "We are not called upon to determine the power of the court under section 136, in cases of recrimination and other statutory defenses and excuses for absence from the domicile."

If we are correct in our conclusion that the trial court had the power to make an award notwithstanding the fact that the divorce was denied because of recrimination, it appears unnecessary to discuss the propriety of the award in the sum of $100 per month. The appellant makes no claim that the trial court abused its discretion in making the award in that amount in the event that it had the power to make any award at all.

[2, 3] The second heading in appellant's brief reads, "Where it is found in a divorce action that the income and property rights of the spouses are identical, does the court have the power to award counsel fees to the plaintiff wife?" The question as thus stated might warrant extended consideration but the record before us, consisting of the judgment roll alone, does not present said question for our determination. There is nothing in the record to show that the "income and property rights of the spouses are identical". The record does show that they are equal owners in certain property described in the judgment, but there is nothing to show that appellant is not the owner of separate property or that his income or earnings are or will be limited to his share of the proceeds of the property described in the judgment. In fact, the findings made in the order awarding counsel fees show that appellant "is capable of engaging in business" and "is well able to pay to plaintiff a reasonable amount of money as and for attorney's fees". All presumptions are in favor of the validity of the order of the trial court (Ramacciotti v. Ramacciotti, 131 Cal.App. 191, 20 P.2d 961) and we find nothing in the record before us to show any error or abuse of discretion on the part of the trial court in making the abovementioned award of counsel fees.

The portion of the judgment appealed from is affirmed, and the order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

## PEOPLE v. ANDERSON et al. *

### Cr. 3150.

District Court of Appeal, Second District, Division 2, California.

May 24, 1939.

Rehearing Granted June 8, 1939.

Hearing Denied June 22, 1939.

**1. False pretenses 🔑49(1)**

In prosecution for grand theft committed by means of contracts for sale of ore which was never mined or shipped, evidence established guilty connection of accused with those by whom contracts were actually negotiated.

**2. Larceny 🔑40(3)**

The fact that conspiracy was not pleaded in indictment charging grand theft did not prevent proof by prosecution of existence of a conspiracy, and instruction concerning the applicable law, after such proof was made, was proper.

**3. Criminal law 🔑423(1)**

The acts and declarations of co-conspirators in furtherance of the object of the conspiracy are admissible as against all the conspirators.

**4. Licenses 🔑18½**

A purchase and sale agreement covering a designated commodity is not a "security" under common understanding nor within the Corporate Securities Act requiring a permit to be obtained from the Corporation Commissioner. St.1937, p. 1428, § 2, subd. 7.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

**5. Licenses 🔑18½**

Contracts for sale of ore were not "securities" within requirement of Corporate Securities Act that permit be obtained from the Corporation Commissioner, notwithstanding buyers were guaranteed a return of double the purchase price of the ore, so that conviction for violation of the act of one allegedly participating in transaction was unauthorized. St.1937, p. 1428, § 2, subd. 7.

McCOMB, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

L. W. Anderson, A. S. Barricklow, and J. L. Harper were charged in an indictment with violation of the Corporate Securities Act and with grand theft. Anderson and Harper were convicted, and Harper appeals.

Conviction for grand theft affirmed; conviction for violation of the Corporate Securities Act reversed.

E. T. McGann, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

Harry T. Young, of Los Angeles, amicus curiæ.

WOOD, Justice.

The defendants Anderson, Barricklow and Harper, were jointly charged in an indictment containing forty counts with the crimes of violation of the Corporate Securities Act St.1917, p. 673, as amended and of grand theft. Defendant Barricklow fled and was not apprehended. Defendants Anderson and Harper were convicted on various counts charging both offenses. Defendant Harper prosecutes this appeal from the judgments and from the order denying his motion for a new trial.

Appellant contends that, even if it be conceded that Anderson and Barricklow are guilty of grand theft, the evidence is insufficient to show his complicity in their criminal transactions. Defendants Anderson and Barricklow were in personal control of an office in the city of Long Beach, which they used as headquarters for making agreements with various persons for the sale of ore to be shipped from mines in San Bernardino county and in the state of Arizona to a smelting company in Salt Lake City. The following is typical of the agreements signed, each of which is entitled, "Bill of Sale". "Know All Men By These Presents: That the Star of Cima Mines, party of the first part, for and in consideration of the sum of One Hundred twenty-five dollars ($125.00) legal tender of the United States of America, to me in hand paid by Nettie A. Barton, party of the second part, the receipt whereof is hereby acknowledged, do by these presents sell unto the said party of the second part, his executors, administrators and assigns, Fifty (50) tons of ore at the Star of Cima Mines, said ore to be shipped to the American Smelter and Refining Company at Salt Lake City, Utah, within Ninety (90) days from date. It is agreed that the Star of Cima Mines will remit direct to the said Nettie A. Barton the sum of Two Hundred fifty dollars ($250). It Is Further Agreed that should the shipment not be sufficient to bring a net return of the required ($250.00) the party of the first part agrees to make a further shipment immediately to cover the deficit. Unavoidable Delays. It is further agreed that the obligations imposed upon the first party may be suspended by the elements, accidents, strikes, lockouts, riots, delays in transportation, or interference by State or Federal action, or causes beyond the control of the first party. Dated this 1 day of December 1934 Witness: (Signed) Georgene Williams (Signed) L. W. Anderson Party of the first part Star of Cima Mines (signed) Nettie A. Barton Party of the second part". In two of the counts Anderson was named in the bills of sale as first party and the ore was designated as being "at the J and J and Klondyke Mines near the Colorado River, Mojave County, Arizona".

---

*For subsequent opinion see 94 P.2d 627.

No ore was ever mined or shipped and defendants did not have any facilities for mining or shipping the ore. No mine was in existence bearing the name "Star of Cima." The evidence is overwhelming that Anderson and Barricklow were defrauding the parties with whom the contracts were made and that they were guilty of grand theft in making false representations to prospective purchasers that the ore was available for shipment and was being shipped and that other people had actually doubled their money in similar transactions.

[1] The evidence is sufficient to establish the guilty complicity of appellant in the operations of Anderson and Barricklow. Under date of November 19, 1934, appellant and Anderson signed an instrument concerning the purchase of ore which is as follows: "Know All Men By These Presents: That, whereas, the undersigned, party of the first part, is the owner by location of the Arizona Belle or Tres Hombres Malos group of mining claims in the Klondyke district, Mohave county, Arizona, and by lease and bond of the Jim and Jerry group of mining claims in the same district, county and state, and which said two groups of mining claims contain developed, partly developed, and, in place, a large tonnage of commercial gold ore; and the said party, and his associates, are desirous of developing, mining, extracting, milling and shipping and smelting ore from the said premises, and to that end are in need of funds; and Whereas, the party of the second part, agrees that he is in position, through his resources and resources of certain friends and associates, among them Mr. A. Barricklow, to provide certain funds for the purposes named, and that he will engage to do so provided security be given in the form of a bill of sale of a tonnage of commercial-grade ore sufficient, after all costs of developing, mining, trucking, milling or smelting, and royalty, if any, have been deducted, to yield at least double the amount of purchase price, to provide the said funds as and when needed, it being expressly understood that the said funds are for the purpose of creating mine production and the further purpose of providing milling facilities on the ground. Now, therefore, the party of the first part, for and in consideration of the sum of One Dollar, in hand paid him by the party of the second part, and other valuable considerations, does hereby sell, convey and set over unto the party of the second part, and through him to his associates, five thousand (5000) tons of said commercial ore, and an option for five thousand tons additional, at the price of $2.00 per ton, against the purchase price of which the party of the second part agrees to make certain payments per week or month in a manner best to serve the developing and operating needs of the party of the first part; and that the party of the first part will mine and deliver or cause to be mined and delivered to the order of the party of the second part, such part or all of the above-named tonnage as can be so mined and delivered with the facilities provided, and as can be shipped and smelted, or milled at commercial or leased plants, or treated on the ground, it being understood that the party of the first part will do his utmost in this connection consistent with the means provided but that this obligation shall not prevail as against impracticable or impossible marketing conditions, until our own mill is installed, or against contingencies commonly ascribed to acts of God." Appellant testified that to carry out the terms of this agreement would involve him in a loss of approximately $110,000. His only explanation was that he needed the money for operation and considered it good business in the long run.

Appellant's direct connection with the activities of Anderson was otherwise shown by a number of witnesses. J. B. Mighton testified that he was the owner of a mine known as the "Morning Star Mine" in the vicinity of Cima and that in the year 1934, the month not being remembered, appellant and defendant Anderson and one Truax examined his mining property and took samples, but the witness did not give any of them a contract by which they were entitled to operate the property. In answer to the question, "Now do you know when the name 'Star of Cima' was decided upon?" the appellant, while making a statement concerning his contracts, answered: "No, that was Mr. Anderson, he decided upon that, to use that as what I considered at the time, for a covering term for our contracts. I never understood that he assumed it had any direct connection with the Arizona or California property." The letterheads in the Long Beach office carried the names of Anderson, Barricklow and Harper in type of equal size above the words in larger type, "Star of Cima Mines".

Appellant owned no property in the Cima district and his only interest in Arizona property was by way of a so-called "bond and lease" permitting him to operate certain mining property but in which he was in default on his payments to the owners. Appellant claimed to be in need of money to operate the Arizona mine and had no ore ready for shipment or means for mining or shipping ore. According to his statement he depended upon Anderson and Barricklow to provide him the means for mining and shipping the ore but the means adopted turned out to be the fraudulent agreements which they made with their victims in Long Beach, agreements in which by the jury's implied finding, appellant had guilty participation. Appellant was in frequent communication with Anderson by wire and letter. On September 30, 1934, he wrote Anderson as follows: "Dear Mr. Anderson: Responding as to the probable outlook during the month of October, it will be within the capacity of our operations to have say 21 cars during that period. Endeavor will be made to steadiness in output so all commitments made or planned in connection therewith will be promptly met. Sincerely yours, J. L. Harper." Some of the witnesses testified that they had seen communications to Anderson over the signature of appellant. Since appellant had no facilities for mining and shipping the ore it is reasonable to conclude that fraudulent communications were sent by appellant for the purpose of aiding Anderson and Barricklow in duping the public.

That appellant was informed concerning the type of contract being made with the public by Anderson could readily be inferred from his own testimony in which he admitted a number of his activities set forth herein. He also admitted that he had signed in blank and given to Mr. Truax for the purpose of raising money instruments similar in form to those being used by Anderson. These instruments were as follows: "Know All Men By These Presents: That (blank), party of the first part, for and in consideration of the sum of (blank) dollars, legal tender of the United States of America, in hand paid by (blank), party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell unto the said party of the second part, his executors, administrators and assigns (blank) tons of ore at the Arizona Belle, Tres Hombres Malos Mines, near the Colorado River, Mojave County, Arizona. Said ore to be shipped to a custom smelter or mill where the best treatment rate is procured, within (blank) days from date hereof. The smelter or mill to remit directly to the said (blank) the sum of (blank) dollars. It is further agreed that should the shipment not be sufficient to bring a net return of the expected sum, the party of the first part will make a further shipment required to cover the deficit. Unavoidable delays: It is further agreed that the obligations imposed upon the first party as to manner or time of shipment may be suspended by the elements of accidents, strikes, lockouts, riots, delays in transportation, embargoes, or interference by State or Federal action, or other causes beyond control of parties of first part. Dated this 18th day of December, 1934." Several of these instruments were used and the blank spaces filled out in such manner that the purchasers were guaranteed a return of double the purchase price.

Appellant signed a "Memorandum of Co-Partnership" before a notary and caused it to be recorded in the office of the county recorder of San Bernardino county, in the following language: "Memo of Co-Partnership This Is To Certify; that the mine development and mining operations carried on under the name 'J. L. Harper, Manager' in San Bernardino County, California, in the Cima and other districts and in the Klondyke district, of Mohave County, Arizona, is by and for a Co-partnership, composed of J. L. Harper, of Los Angeles, California, and his associates: and L. W. Anderson, of Long Beach, California, and his associates; and that the said Copartnership is for the purpose of examining, optioning, leasing, purchasing, and operating Metal Mines, etc., and that the said Co-partnership is later to be resolved to a Trust Estate or a corporate entity, at which time the respective interests of all concerned will appear in Trust Estate Certificates or Corporate Shares; that the mine control and operations are in the hands of J. L. Harper and the financial matters in the hands and under the direction of L. W. Anderson. Dated this 16th day of September, 1934. (Signed) J. L. Harper."

There is no merit in appellant's contention that the evidence fails to show appellant's guilty connection with the fraud. The jury was justified in finding that he conspired with and aided and abetted the other defendants.

[2, 3] Appellant contends that the court erred in admitting evidence to prove a conspiracy and in giving to the jury a number of instructions on the subject of conspiracy. The fact that conspiracy was not pleaded in the indictment did not prevent proof by the prosecution of the existence of a conspiracy and it was proper to instruct the jury after such proof concerning the law applicable. People v. Tanner, 3 Cal.2d 279, 299, 44 P.2d 324. It is elementary that the acts and declarations of coconspirators in furtherance of the object of the conspiracy are admissible in evidence as against all the conspirators.

Appellant makes several other criticisms concerning the admission of testimony and concerning the instructions to the jury. All of the points advanced have been directly passed upon adversely to his contentions or they are of so little importance as to make discussion inappropriate.

[4, 5] A serious question is presented, however, by the contention of appellant that the evidence admitted fails to establish a violation of the Corporate Securities Act, St.1917, p. 673, as amended. It is conceded that no permit was obtained from the commissioner of corporations but it is argued that no permit was necessary. The prosecution argues that the instruments signed by Anderson, and the various residents of Long Beach, which are termed bills of sale, are in fact securities as defined by subdivision 7 of section 2 of the Corporate Securities Act, as amended by St.1937, p. 1428 which reads as follows: "7. Security. The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, guarantee of a security and any certificate of deposit for a security." It is apparent that defendants did not sell a "beneficial interest in title to property, profits or earnings", since the instruments show a direct sale of a definite number of tons of ore located at a designated mine. The fact that defendants guaranteed a return of double the purchase price of the ore does not change the nature of the instrument. The prosecution cites People v. White, 124 Cal.App. 548, 12 P.2d 1078; People v. Claggett, 130 Cal.App. 141, 19 P.2d 805; People v. Coyle, 134 Cal.App. 612, 613, 25 P.2d 991; Domestic & Foreign Pet. Co., Ltd., v. Long, 4 Cal.2d 547, 51 P.2d 73, and People v. Jackson, 24 Cal.App.2d 182, 74 P.2d 1085. In all of these cases, however, the parties obtained instruments showing that an interest only had been obtained in the property being sold or that the transactions evidenced an investment in the concerns operated by the defendants. In the case now before us the parties purchased the ore outright and made no investment in the business conducted by defendants. A purchase and sale agreement covering a designated commodity is not a security under the common understanding of the term or by the definition in the Corporate Securities Act. Since it was not necessary for defendants to obtain a permit from the commissioner of corporations to sell the ore referred to in the indictment, the convictions charging violation of the Corporate Securities Act cannot be sustained.

The judgments and order denying a new trial in respect to the counts charging grand theft, counts III, IV, VII, IX, XII, XXIX, XXXIV, XXXVII, XXXIX, and XXXX are affirmed. The judgments and order denying a new trial with respect to the counts charging violation of the Corporate Securities Act, counts, I, II, V, VI, VIII, X, XI, XIII, XVI, XVII, XVIII, XX, XXI, XXII, XXIV, XXV, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII, are reversed.

I concur: CRAIL, P. J.

McCOMB, Justice.

I concur in the judgment reversing counts I, II, V, VI, VIII, X, XI, XIII, XVI, XVII, XVIII, XX, XXI, XXII, XXIV, XXV, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII.

I dissent from the judgment affirming the conviction on counts III, IV, VII, IX, XII, XXIX, XXXIV, XXXVII, XXXIX, and XXXX.

Viewing the evidence most favorable to respondent, the essential facts are:

On November 19, 1934, appellant entered into an agreement to sell defendant Anderson 5,000 tons of gold bearing ore at the price of $2 per ton. He received on account of this contract $3,400. Thereafter defendants Anderson and Barricklow, without first obtaining a permit from the corporation commissioner, entered into agreements with a number of persons, of which the following is typical:

"Bill of Sale

"Know All Men By These Presents:

"That the Star of Cima Mines, a party of the first part, for and in consideration of the sum of One Hundred twenty five dollars ($125.00) legal tender of the United States of America, to me in hand paid by Nettie A. Barton, party of the second part, the receipt whereof is hereby acknowledged, do by these presents sell unto the said party of the second part, his executors, administrators and assigns, Fifty (50) tons of ore at the Star of Cima Mines, said ore to be shipped to the American Smelter and Refining Company at Salt Lake City, Utah, within Ninety (90) days from date. It is agreed that the Star of Cima Mines will remit direct to the said Nettie A. Barton the sum of Two Hundred fifty dollars ($250).

"It Is Further Agreed that should the shipment not be sufficient to bring a net return of the required ($250.00) the party of the first part agrees to make a further shipment immediately to cover the deficit.

"Unavoidable Delays. It is further agreed that the obligations imposed upon the first party may be suspended by the elements, accidents, strikes, lockouts, riots, delays in transportation, or interference by State or Federal action, or causes beyond the control of the first party.

"Dated this *1* day of December, 1934

"Witness:
"[Signed] *L. W. Anderson*
"Party of the first part
"[Signed] Star of Cima Mines
"[Signed] *Nettie A. Barton*
"Party of the second part
"*Georgene Williams*
"Received payment in full
"........................"

These two defendants represented to the parties with whom they were dealing that they would double their money by entering into the transactions. In each instance charged in the indictment, not only did the parties dealing with defendants Anderson and Barricklow not receive double their money, but neither their investment nor any portion thereof was returned to them.

Appellant relies for reversal of the judgment on this proposition:

*There is no substantial evidence to sustain the implied findings of fact of the jury upon which the judgments against him were necessarily predicated, to-wit, that he had conspired with his codefendants to commit the various violations of the corporate securities act and grand thefts charged in the indictment.*

This proposition is tenable. An examination of the record fails to disclose any evidence that appellant had knowledge of or participated in any way in the various transactions which took place between his codefendants and the complaining witnesses. The only evidence connecting appellant in any way with the transactions was that he entered into the agreement of November 19, 1934, with defendant Anderson mentioned above and that on several occasions he telegraphed his codefendants that certain quantities of ore had been mined by him, and on September 30, 1934, wrote defendant Anderson the following letter:

"Dear Mr. Anderson:

"Responding as to the probable outlook during the month of October, it will be within the capacity of our operations to have say 21 cars during that period. Endeavor will be made to steadiness in output so all commitments made or planned in connection therewith will be promptly met.

"Sincerely yours,
"J. L. Harper."

It thus appears that the record is devoid of any evidence even slight which connects or tends to connect appellant with any of the crimes of which he was convicted.

For the foregoing reasons counts III, IV, VII, IX, XII, XXIX, XXXIV, XXXVII, XXXIX, and XXXX of the judgments appealed from should in my opinion be reversed and a new trial granted.

33 Cal.App.2d 219

**SILLS et al. v. FORBES et al.**

**FORBES et al. v. SILLS et al.**

**Civ. 2257.**

District Court of Appeal, Fourth District, California.

June 6, 1939.

Hearing Denied Aug. 3, 1939.

**1. Automobiles 🔑244(3)**

In action for injuries sustained in automobile collision, evidence *held* to show that road on which collision occurred was not open to public use as matter of right for vehicular travel, and hence was not public "street" or "highway," but "private road." Vehicle Code, §§ 81, 82, St.1935, p. 98.

[Ed. Note.—For other definitions of "Highway," "Private Road" and "Street," see Words & Phrases.]

**2. Negligence 🔑32(2)**

The distinction between "invitation" and "license" to go on another's premises is that former is inferred where there is common interest or mutual advantage and latter where object is mere pleasure or benefit of licensee.

[Ed. Note.—For other definitions of "Invitation" and "License," see Words & Phrases.]

**3. Automobiles 🔑155**

Employees of farmers expressly permitted by owner of private road to use it as long as they kept it in good condition were using it as invitees by such owner's implied invitation at time of collision between motor vehicles driven by such employees on such road, and each driver was bound to use same degree of care to refrain from injuring the other.

**4. Easements 🔑64**

An invitee lawfully using private road stands in shoes of owner thereof towards another invitee also lawfully using road.

**5. Automobiles 🔑146, 155**

A motorist, driving on either public or private road, must exercise degree of care and caution that ordinarily careful and prudent person, acting in same or similar circumstances, would exercise for safety of others traveling thereon. Civ.Code, § 1714; Vehicle Code, St.1935, p. 93.

**6. Automobiles 🔑245(4)**

In action for injuries to passenger in automobile colliding with truck on private road, defendant truck driver's negligence in driving along center of road into dust cloud, obscuring view of automobile until it was about 8 feet from truck, was fact question for jury.

**7. Appeal and error 🔑1001(1)**

The appellate court cannot disturb jury's implied finding, supported by evidence, that defendant, appealing from judgment on verdict for plaintiff, was guilty of negligence constituting concurrent cause of plaintiff's injury.

**8. Automobiles 🔑201(8)**

An automobile driver's negligence, constituting concurrent cause of collision with truck, cannot relieve truck driver from liability for injuries to passenger in automobile as result of such driver's negligence which was also concurrent cause of collision.

**9. Automobiles 🔑246(24)**

An instruction that person lawfully on roadway may assume that motor vehicle drivers will obey traffic laws and regulations was erroneous as indefinite and confusing, where instructions set forth no such laws and regulations.

**10. Trial 🔑238**

The trial judge must instruct jury on law applicable to case and should not permit jurors to speculate on what law may be.

**11. Automobiles 🔑155**

The rules of road in Vehicle Code are inapplicable in action for injuries sustained in automobile accident on private road. Vehicle Code, St.1935, p. 93.

**12. Trial 🔑252(1)**

An instruction to jury must be based on, and its effect weighed by, facts of particular case.

**13. Trial 🔑253(4)**

An instruction that person lawfully on roadway may assume that motor vehicle drivers will obey traffic laws and regulations was erroneous as omitting element that driver relying on such assumption must himself be exercising due care.

**14. Appeal and error 🔑1068(1)**

In action for injuries to passenger in automobile colliding with truck, instruction that person lawfully on roadway may assume that motor vehicle drivers will obey traffic laws and regulations was not prejudicial to drivers of two vehicles, where jury correctly found both of them negligent.

**15. Automobiles ⚷153, 155**

The universal custom of operating motor vehicles on right side of roadway has established standard of due care to which all drivers should be required to conform, whether driving on public street or highway or on private road.

**16. Appeal and error ⚷1068(1)**

In action for injuries to passenger in automobile colliding with truck, erroneous instruction that person lawfully on roadway may assume that motor vehicle drivers will obey traffic laws and regulations was not prejudicial to drivers of colliding vehicles, which jury found were negligently driven in center of road, in view of universal custom of operating vehicles on right side of roadway.

**17. Automobiles ⚷244(3)**

In action for injuries to passenger in automobile colliding with truck on private road, one witness' testimony, contradicted by clear and convincing evidence of other witnesses and photographs of road at and near scene of accident, that it was customary for vehicles to proceed down center of such road, did not require jury to find existence of such established local custom.

**18. Evidence ⚷158(5)**

Testimony as to witness' present residence at village wherein state insane asylum is located was inadmissible to prove such witness' recent commitment to asylum, especially where parties offering such proof made no effort to obtain court records of such commitment in county clerk's office near courtroom and did not offer them in evidence.

**19. Evidence ⚷158(5)**

Contents of court records, available to party seeking to use them as evidence, cannot be proved by parol.

---

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action for injuries suffered in an automobile accident by Herold Sills, a minor, by his guardian ad litem, Henry Sills, and Virgle Sills, against Henry Forbes and another, in which defendants filed a cross-complaint against plaintiff Virgle Sills and another. From a judgment for minor plaintiff and cross-defendants, defendants and cross-complainants appeal.

Affirmed.

Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for appellants.

Clarence H. Wilson and Roger R. Walch, both of Hanford, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of Herold Sills, a minor, against Henry Forbes and E. C. Salyer in the sum of $5,000 for personal injuries suffered in an automobile accident, and in favor of Virgle Sills and J. B. Long, cross-defendants, against Henry Forbes and E. C. Salyer, cross-complainants. When appropriate, we will refer to Herold Sills as the plaintiff and to Henry Forbes and E. C. Salyer as the defendants.

The accident, a head-on collision between two motor vehicles, happened at slightly before six o'clock on the morning of October 13, 1936, on a private road about twenty miles southwest of the city of Corcoran in Kings county. The road ran over property belonging to a Mrs. Baldwin and was kept in repair by farmers operating in that district.

Herold Sills was a minor of the age of about seventeen years. He and his brother, Virgle Sills, were employed as irrigators by J. B. Long, a farmer, engaged in farming in that district. They had worked from six o'clock in the evening of October 12, to a short time after five o'clock on the morning of October 13, 1936, when they entered Virgle's automobile to return to the J. B. Long camp which was located on or near the private road, and where they were living during their employment. Herold went to sleep immediately after entering the car and did not waken until after the accident. It is admitted that he was Virgle's guest and that the negligence of Virgle could not be imputed to Herold.

The Sills brothers left their place of employment in Virgle's automobile. Virgle was driving. They were preceded, at a distance of between two hundred fifty and three hundred yards, by a small truck which was being driven by a fellow employee of J. B. Long. The vehicles reached the private road in question here and turned west. This road was covered with fine dust. The dust rose behind the truck in a dense cloud which covered more than the width of the road and extended to the rear of the truck for a considerable distance.

Henry Forbes was driving a truck belonging to E. C. Salyer, his employer, east on the private road at this same time. He was acting within the scope of his employment and was on his employer's business. The two trucks met and passed and Forbes drove into the dust cloud at a speed which he estimated at about twenty miles an hour. He had observed the cloud of dust for some time before he met the truck. After entering the dust cloud he could not see more than about eight feet beyond the hood of his truck so he reduced its speed to about eight miles an hour, intending to stop.

Sills was driving west in this cloud of dust at a speed of about twenty or twenty-five miles an hour. He did not see the Forbes truck approaching until it was about fifteen feet from his car. Both vehicles were straddling the center of the road. The left fronts of the vehicles came into violent contact. Both were demolished and the three men were badly injured. As the jury found that both drivers were negligent we need not consider their injuries. Nor will we concern ourselves with the negligence of Virgle Sills which is admitted.

The following questions necessarily require our consideration on this appeal: (1) Was the road in question a private road, as defined in section 82 of the Vehicle Code (St.1935, p. 98), or was it a street or highway, as defined in section 81 of the same code? (2) Were plaintiff and Virgle Sills licensees or invitees in traveling over this road? (3) What was the reciprocal duty owed by each driver to the other, it being admitted that Forbes was an invitee on this road? (4) Was Forbes guilty of any negligence, or was the accident caused solely by the negligence of Virgle Sills? (5) Was an erroneous instruction prejudicial? (6) Was a ruling by the trial judge on the admissibility of evidence erroneous and prejudicial?

In considering these questions we will confine ourselves to a summary of only such evidence as tends to support the verdict and judgment and will disregard other evidence which conflicts with it. We will consider these questions in the order stated without restating them.

[1] 1. Section 81 of the Vehicle Code, in effect at the time of the accident, provided as follows: "'Street' or 'highway' is a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel."

Section 82 of the same code, in effect at the same time, provided as follows: "'Private road or driveway' is a way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other members of the public."

Plaintiff urges that under the evidence the jury was entitled to conclude that the road in question was a highway, as defined in section 81, and not a private road as defined in section 82 of the Vehicle Code.

In considering the definitions of the words "highway" and "private road", as used in these sections, we must bear in mind that when used in the Vehicle Code they are used for the special purposes of that act, and that sections of other codes and the decisions under them relating to the use of the same or similar words can have little bearing on the solution of this problem. Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368.

The evidence before us shows that the road in question had been open for a number of years; that the land upon which it was located was privately owned and had neither been dedicated to nor accepted for public use; that the owner kept signs posted along its boundaries informing travelers that permission to use it was revocable at any time; that express permission had been given by the owner to Salyer and certain other farmers operating in the district to use the road as long as they kept it in good condition; that this permission, at least by implication and custom, had been extended to the employees of these farmers; that a few days prior to the accident notice had been given by the owner requiring the repair of the road.

The best description of the road, its use, condition and maintenance contained in the record is found in the testimony of defendant Salyer, from which we quote the following extracts:

"Q. Do you know whether it's a public or a private road? A. It's a private road.

"Q. Who maintains the road, do you know, Mr. Salyer? A. The various farmers down there. I know I have been helping maintain it ever since we farmed out there, the last six years, six or seven years, and J. D. Long, he has helped maintain it, and I don't know whether Stridde ever did, or not. I believe Stridde has done some work on it.

"Q. It was maintained by private individuals? A. Yes; and Schmeiser, also.

* * *

"Q. Do you know how wide that road is? A. Eighteen feet. I watched Morton measure it. That is, the smooth part of the road. It was wider than the 18 feet but they use a drag to drag it and it was a little more on the rougher portion, maybe, say, a couple of feet on the south side and north side of the road, there is a ditch bank right along here. This is just graded up gradual like this, maybe a little more of a grade like that, and of course they drove clear up onto the top of this thing. * * *

"Q. Well, haven't you been using it during all of this six years you have been farming out there? A. We have permission to use it, with notice that it is revocable at any time.

"Q. What about salesmen and people that have business with the farmers out there? That road is used by trucks that haul grain and cotton— * * *

"Q. By oil companies that haul oil and fuel out there to the camps and the ranches, by the various employees of the ranches going back and forth to town; isn't that correct? A. Yes; they have notices posted on the road, permission revocable at any time, permission to use.

"Q. You say they have? A. Yes. And it wasn't very long before this accident happened that we had to go and repair the roads, and they told us they was going to cut us off to using it if we didn't repair the road.

"Q. They never have cut you off, however; you have used them right along? A. Well, we was ordered that we couldn't use it unless we repaired the roads. I couldn't say we have been cut off entirely.

* * *

"Mr. Brown: Will you describe it? A. They are a better picture than I could describe. It is a nice smooth road for a dirt road. * * *

"Q. Mr. Salyer, you saw the road down there that day? A. I travel it every day, a number of times a day.

"Q. What condition was it in? A. In good shape.

"Q. Was it a road with two marks showing one traveled portion? A. Yes. There was two traveled portions of it.

"Q. The road was used—. Withdraw that. Were both sides of the road used, Mr. Salyer, or was just the middle of the road used? A. Both sides.

"Q. Do you know when the road had been scraped previous to this accident? A. Well, I wouldn't want to place a date, but some few days prior to that. I don't think it had been over, at the longest, a week. From three days to, say, seven or eight days.

"Q. From three days to a week before the accident? A. Yes.

"Q. Was the road equally safe on the sides as well as in the middle? A. Yes, you could go 70 miles an hour if you wanted to."

It is also clear from the evidence that there was considerable traffic on the road, considering its location so that one using it might reasonably expect to meet other users of the road.

From the foregoing evidence we conclude that the road was not "open to the use of the public as a matter of right for purposes of vehicular travel" (sec. 81, Vehicle Code), and was therefore not a public street or highway. There was no *right* vested in the public to use the road. Its use was by permission of the owner and was revocable at any time. This brings the road within the definition of a private road as contained in section 82 of the Vehicle Code.

[2] 2. In discussing the question of what constitutes a person an invitee on premises of another, we find in Madigan v. O. A. Hale & Co., 90 Cal.App. 151, 265 P. 574, 576, the court said:

"In Benson v. Baltimore Traction Co., 77 Md. 535, 26 A. 973, 20 L.R.A. 714, 39 Am.St.Rep. 436, it is said: 'The distinction between an invitation and a license to go upon the premises of another appears to be that the former is inferred where there is a common interest or mutual advantage, while the latter is inferred where the object is the mere pleasure or benefit of the person using it.'

"The law of California accepts these principles as operative in this jurisdiction. 19 Cal.Jur., pp. 617–621."

See, also, Grant v. Sunset Telephone etc. Co., 7 Cal.App. 267, 94 P. 368; Gulley

v. Traders Oil Corp., 102 Cal.App. 557, 283 P. 97; Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807; Lawand v. California Products Co., 9 Cal. App.2d 147, 48 P.2d 979.

[3] When we measure the facts of this case by the foregoing rule the conclusion follows that Virgle Sills and his brother were on the private road as invitees by the implied invitation of the owner of the property. While a particular benefit did not flow to the property owner from the single trip in question, she received a consideration, that of maintenance of the road, from the neighboring farmers for allowing them and their employees and others to use the road. Part of that consideration had passed to her just before the accident here when the farmers put the road in the excellent condition described by Salyer. There is here the express permission by the owner to the use, the long-continued use and maintenance of the road and the common interest and mutual advantage to the owner and those using the road from which a general invitation to use the road may be implied.

It follows that Forbes and the Sills brothers were using the road as invitees. Neither driver had a superior right over the other to its use and each driver was held to the same degree of care to refrain from injuring the other.

Defendants seek to escape this conclusion by pointing to an answer made by Virgle Sills on cross-examination, to the effect that no one had given him permission to use the private road. This statement clearly refers to lack of permission given to the witness *personally*. When understood in that sense it can hardly create even a conflict with the evidence we have summarized and quoted.

[4] 3. Under the facts of this case we are of the opinion that an invitee lawfully using the road stands in the shoes of the owner towards another invitee who is also lawfully using the road. Kirkpatrick v. Damianakes, 15 Cal.App.2d 446, 59 P.2d 556.

[5] In Henslee v. Fox, 10 Cal.App.2d 202, 51 P.2d 1176, it appears that an accident happened on Berry street, a privately owned way in San Francisco, which, on sufficient evidence was found to be a private road. The same case was before the court again (Henslee v. Fox, 25 Cal.App. 2d 286, 77 P.2d 307, 310), where the court approved the following instruction defining the duty which one invitee on the road owed another: " 'However, in either event, the defendants are not absolved from the duty of exercising ordinary care for the safety of others. In determining whether or not ordinary care was exercised, you may ask yourselves this question: "Did the defendant Forrest exercise that degree of care and caution that would have been exercised by an ordinarily careful and prudent person acting in same or similar circumstances?" ' "

The law which is announced in this instruction is equally applicable to a motorist driving on a public or a private road. If used in connection with travel on a public road, it summarizes certain provisions of the Vehicle Code, St.1935, p. 93. If used in connection with travel on a private road, it summarizes some of the provisions of section 1714 of the Civil Code.

We have reached the conclusion that under the facts of this case each driver owed the other, and Forbes owed plaintiff, the duty of exercising ordinary care to avoid injury, and that Forbes was liable to plaintiff for damages caused by his negligence.

[6-8] 4. The question of Forbes' negligence needs scant consideration. He knew, or should have known, the private road was frequently used and that he might meet another vehicle in the dust cloud. He drove into this dust cloud, which was so dense that he could not see more than eight feet in front of the radiator of his truck, and continued on his way with his vehicle straddling the center of the road and into the Virgle Sills automobile. The jury found from these facts that he was guilty of negligence. The question of Forbes' negligence was one of fact addressed to the jury. Where, as here, there is evidence supporting the implied finding that a defendant was guilty of negligence that concurred in causing plaintiff's injury we cannot disturb that finding on appeal. Marshall v. Klatt, 19 Cal.App.2d 110, 64 P.2d 1105. Because Virgle Sills was also negligent, and because his negligence was a concurrent cause of the accident, cannot relieve Forbes from the result of his own negligence which was also a concurrent cause of the collision.

[9, 10] 5. The trial court instructed the jury that: "* * * This rule allows a

person lawfully upon a roadway to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations." That this instruction was erroneous in several particulars cannot be doubted.

The instructions nowhere set forth any of "the traffic laws and regulations", that a driver must abide by. This rendered the instruction indefinite and confusing. Almost every automobile driver thinks he knows the rules of the road. The instruction permitted the jurors to draw upon their own knowledge, real or supposed, of traffic laws and regulations. It is incumbent upon the trial judge to instruct the jury on the law applicable to a case. He should not permit the jurors to speculate on what the law might be.

[11] If the phrase, "the traffic laws and regulations", referred to the rules of the road laid down in the Vehicle Code, they had no application to the instant case as the accident happened on a private road. Gootar v. Levin, 109 Cal.App. 703, 293 P. 706.

[12-14] While the instruction is erroneous and should not have been given, its prejudicial effect remains for consideration.

The only traffic law or regulation Forbes was accused of violating was failing to drive on his own right hand half of the road. An instruction must be based upon and its effect weighed, by the facts of the particular case in which it is given. Under the facts of this case the instruction must be construed as informing the jury that each driver, being lawfully on the road, could assume that the other driver would operate his vehicle on his own right hand side of it. This omits the element that the driver relying on such an assumption must himself be exercising due care. The omission of this element is unimportant in plaintiff's case because he was asleep and a passenger and could not be charged with contributory negligence. It was not prejudicial to Virgle Sills and Forbes because the jury correctly found both of them negligent and awarded them no damages.

[15, 16] In the United States it has always been customary for drivers to operate their vehicles on the right hand side of a roadway. Numerous statutes have enacted that universal custom into law. The custom itself has established a standard of due care to which all drivers should be required to conform. This should be true whether they are driving on a public street or highway and are required to drive on its right hand side by law or are on a private road and are required to drive on its right hand side by universal custom. Under these circumstances the instruction, while erroneous, cannot be regarded as prejudicial.

[17] It is true that one witness testified that it was customary for vehicles to proceed down the center of this particular road. This testimony is contradicted by that of other witnesses and by photographs of the road at and near the scene of the accident. These pictures show two distinct traveled portions of the roadway separated by a less traveled portion in about its center. The testimony of this one witness, contradicted by other clear and convincing evidence, did not require the jury to conclude that there was an established local custom of driving a vehicle down the center of this particular private road.

[18, 19] 6. Defendants complain of a ruling of the trial judge sustaining an objection to a question propounded to one of J. B. Long's witnesses on cross-examination. The question concerned the present residence of the witness. In a proffer of proof counsel for defendants stated they expected to prove that the witness had been recently committed to the state hospital for the insane at Patton, California.

Residence of the witness at Patton, California, would not prove he had been committed to the insane asylum there. Many people live at Patton, California, some at the state hospital, others in the village and its environs, none of whom have been committed to the state institution. His commitment could have been proved by the records of the superior court of Kings county in the county clerk's office a few doors from the courtroom where this case was being tried. Contents of court records cannot be proved by parol where they are available to the party seeking to use them as evidence. Defendants made no effort to obtain those records and did not offer them in evidence. Thus they failed to use competent evidence to establish the commitment of the witness, which evidence was at all times available to them.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

35 Cal.App.2d Supp. 745

## PEOPLE v. ZIMBROLT.

C. A. 1582.

Appellate Department, Superior Court, Los Angeles County, California.

May 25, 1939.

**1. Trade-marks and trade-names and unfair competition** ⚷49

The statute prohibiting possession of label bearing trade-mark of another for purpose of disposing of any article with intent to deceive or defraud makes it a crime to possess a label only when he who has label also has purpose of disposing of article to which label may be affixed. Pen.Code, § 354.

**2. Trade-marks and trade-names and unfair competition** ⚷49

The statute prohibiting possession of label bearing trade-mark of another for purpose of disposing of article with intent to deceive or defraud makes possession for purpose of disposing of article unlawful, but does not make unlawful possession for purpose of selling to another person to enable such person to dispose of an article. Pen. Code, § 354.

**3. Criminal law** ⚷549

Crimes cannot be built up with aid of inference, implication, and strained interpretation.

**4. Statutes** ⚷241(1)

Penal statutes must be construed to reach no further than their words, and no persons can be made subject to them by implication.

**5. Trade-marks and trade-names and unfair competition** ⚷49

A defendant who sold labels closely resembling trade-marked rum and whisky labels, to one whom he believed to be a bootlegger desiring counterfeit labels in order to promote sale of bootleg liquor, was not guilty under statute of possessing label bearing trade-mark of another for the purpose of disposing of an article with intent to deceive or defraud. Pen.Code, § 354.

◆

Appeal from Municipal Court of Los Angeles; Charles P. Johnson, Judge.

Sol Zimbrolt was convicted for possessing a label bearing the trade-mark of another for the purpose of disposing of an article with intent to deceive or defraud, and he appeals.

Reversed and remanded for new trial.

Orloff & Katz, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Marvin Chesebro, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Judge.

The facts in this case are not in dispute, but the interpretation to be placed upon the provisions of section 354, Penal Code, under which appellant was charged, convicted and sentenced, is in dispute. Because we are of the opinion that the undisputed facts fail to show that the appellant violated any provision of the section, when construed as it should be, we have concluded that the judgment must be reversed.

The section, which has not been the subject of any reported decision, has read as follows since the year 1897: "Every person who has in his possession, or who uses any cask, bottle, vessel, case, cover, label, brand, or other thing bearing, or having in any way connected with it, the trade-mark of another, which has been duly recorded in the office of the secretary of state, or with the commissioner of patents in the United States patent-office, or the trade name of another, for the purpose of disposing of any article other than that which such cask, bottle, vessel, case, cover, label, brand, or other thing originally contained, or is connected with by the owner of such trade-mark, or trade name, with intent to deceive or defraud, is guilty of a misdemeanor."

In proof of the charge that the defendant had twice offended against the section, the People proved and now rely upon these facts. The defendant had in his possession a number of labels bearing a very close resemblance to those authentically used by the makers of Bacardi rum and also a number much like those rightfully used by the makers of The Old Smuggler Whiskey. The genuine labels, both of the rum and of the whiskey, bore, and those possessed by the defendant appeared to bear, the trade-marks of the respective makers, which trade-marks had been registered (recorded) with the commissioner of patents in the United States patent-office. The defendant sold the labels, both for the Bacardi rum and The Old Smuggler whiskey, to one whom he believed to be a bootlegger desiring to obtain some counterfeit labels to further the sale of his home-made products. With the labels, the defendant sold some corks and other trimmings to make the bootlegger's rum and whiskey pass more readily as Bacardi and The Old Smuggler.

[1-5] However much we may decry the willingness of the defendant to cooperate, for a price, in making it possible to pass off he-knew-not-what-concoction to those seeking Bacardi and The Old Smuggler, we cannot see in the facts of the case a violation of the section under which the defendant was charged and convicted. For our purposes, many of the words of the section may be discarded in order that its meaning may the better be understood; we are not concerned with casks, for example, nor with one "who uses" inasmuch as defendant's crime, if any, was in possession, but not in making use of, any of the enumerated articles. Thus reduced to essentials, the section reads: "Every person who has in his possession, * * * any label * * * bearing * * * the trade-mark of another * * * *for the purpose of disposing of any article* * * * with intent to deceive or defraud, is guilty of a misdemeanor." The emphasis we have added points to the element, plainly essential to the existence of a crime, which is wholly lacking in the facts of this case. That is to say, the section makes it a crime to possess a label only when he who has the label also has the purpose of disposing of an article to which the label may be affixed. It is the possession for the purpose of disposing of any article which is interdicted, not possession with the purpose of selling to another person to enable the latter to dispose of an article. Crimes are not to be "built up by courts with the aid of inference, implication, and strained interpretation." Ex parte McNulty, 1888, 77 Cal. 164, 168, 19 P. 237, 239, 11 Am.St.Rep. 257, and "penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication." Ex parte Twing, 1922, 188 Cal. 261, 265, 204 P. 1082, 1084. As it appears that the only purpose that the defendant had in possessing the labels was to dispose of them, that he was a bootlegger of labels, not of liquor, the evidence is insufficient to support the conviction.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial.

SHAW, P. J., concurs.

SCHAUER, Judge (concurring).

I concur. While the defendant thought he was selling to the witness Bottini "a label * * * bearing * * * the trade name of another" to be used by the witness "for the purpose of disposing" of an article "other than that which such * * * label * * * is connected with by the owner of such * * * trade name," such witness in reality was a pseudo, not an actual, bootlegger. The purpose of his possession of the labels acquired from defendant was not to dispose of any article but to entrap defendant; the use he contemplated for such labels was as evidence of some crime, not to fraudulently sell a spurious article falsely marked thereby. Since neither Bottini's possession nor contemplated use was for a purpose within the proscription of the statute, defendant cannot, in aiding him thereto, be said to have abetted a crime. See sections 31 and 659, Penal Code. As defendant's own possession of such labels, as well as any personal use therefor, was likewise innocuous to the statute, he is not guilty as charged.

32 Cal.App.2d 365

**KANE v. UNIVERSAL FILM EXCHANGES, Inc., et al.**

**Civ. 11096.**

Supreme Court of California.

June 20, 1939.

**Courts 🔑487(5)**

Where showing of appellant in support of its application for a writ of supersedeas was insufficient to justify granting such application, appellant's petition for a transfer of the cause after decision by District Court of Appeal was denied by Supreme Court.

HOUSER, J., dissenting in part.

In Bank.

On petition for a transfer of the cause after decision by the District Court of Appeals.

Petition denied.

For decision of District Court of Appeal, see 89 P.2d 693.

Gavin McNab, Schmulowitz, Aikins & Wyman, Nat Schmulowitz, and Peter S. Sommer, all of San Francisco, for petitioners.

Henry C. Clausen, of San Francisco, for respondent.

PER CURIAM.

Upon a hearing of the petition for a transfer of this cause after decision by the District Court of Appeal, we are of the opinion that the showing on the part of appellant in support of its application for a writ of supersedeas was insufficient to justify said court in granting said application. We, however, withhold approval of those statements in the court's opinion which are directed solely to the merits of the order denying appellant's motion for a change of place of trial.

The petition is denied.

HOUSER, Justice (dissenting in part).

I concur generally in the foregoing order, but dissent from that part of the order by which this court purports to "withhold approval" of certain designated "statements" which occur in the opinion of the District Court of Appeal. As far as I know, this court is unauthorized to assert its approval or disapproval with respect to an opinion of any other court. In that regard, the only possible source of power is contained in the language which appears in sections 4 and 4c, Article VI, of the Constitution of this state; but in neither of such sections of the Constitution is language employed which either expressly or impliedly purports to authorize this court to assume either to approve or to disapprove of any "statement" which may be made by the District Court of Appeal. My views with reference to the authority of this court in a situation such as here is under consideration are more fully stated regarding a similar order that was made by this court in pursuance of a petition to hear an appeal after decision thereof by the District Court of Appeal in the case of Wires v. Litle, 27 Cal.App.2d 240, 245, 80 P.2d 1010, 82 P.2d 388.

---

13 Cal.2d 620

**JERSEY MAID MILK PRODUCTS CO., Inc., et al. v. BROCK, Director of Agriculture.**

**L. A. 16986.**

Supreme Court of California.

June 8, 1939.

**1. Appeal and error 🔑863**

On appeal from an order sustaining a demurrer to a complaint seeking to enjoin enforcement and administration of Milk Stabilization Act, only question presented for review was whether statutes directed toward the stabilization of milk prices were constitutional. St.1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372.

**2. Constitutional law 🔑48**

All presumptions and intendments are in favor of the constitutionality of a statute.

**3. Constitutional law 🔑48**

Before an act of a co-ordinate branch of the government can be declared invalid for the reason that it is in conflict with the Constitution, such conflict must be clear, positive and unquestionable.

**4. Constitutional law 🔑48**

Where fair and reasonable doubt as to statute's constitutionality exists, statute should be upheld and doubt resolved in favor of the expressed wishes of the people as given in the statute.

**5. Constitutional law 🔑298(1)**
**Food 🔑1**

The statutes relating to stabilization and marketing of fluid milk and fluid cream are not unconstitutional as an improper exercise of police power in violation of the due process clause of the Federal Constitution, since milk business bears such relation to the welfare of those dependent upon its use as to be clothed with a public interest and subject to regulation under the police power. St.1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372; U.S.C.A.Const. Amend. 14.

**6. Food 🔑1**

Failure of Legislature to limit operation of statutes relating to stabilization and marketing of fluid milk and fluid cream did not render statutes invalid where statutes were enacted to protect an industry from a perilous condition which was permanent in character. St.1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372.

**7. Constitutional law 🔑82**

Failure by Legislature to limit operation of law to a definite term does not render law invalid so long as conditions which justify the passage of the law remain.

**8. Food 🔑1**

Under the police power of the state, Legislature may regulate the marketing of fluid milk and fix the price at which it may be sold. St.1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372.

**9. Food 🔑4**

Under statutes relating to stabilization and marketing of fluid milk and fluid cream and defining fluid milk as milk produced in conformity with quality standards prescribed for "market milk" which is defined as milk supplied to the consumer in the natural fluid state or prepared for human consumption without being converted into any other form or product as distinguished from "manufacturing milk," which is not defined, "manufacturing milk" comprises and includes all milk supplied or prepared for human consumption except market or fluid milk. St.1937, p. 151, § 735.3; p. 642, § 479.

**10. Statutes 🔑71**

Under constitutional provision respecting uniformity of legislation, a statute is "uniform" in its operation if it applies alike to all persons or objects within a class founded upon some natural, intrinsic or constitutional distinction. Const. art. 1, §§ 11, 21.

[Ed. Note.—For other definitions of "Uniform," see Words & Phrases.]

**11. Statutes 🔑74(1)**

Under statutes relating to stabilization and marketing of fluid milk and fluid cream, division of milk industry into two classifications, one governing marketing of fluid milk and other applying to manufacturing milk is founded upon natural distinction existing between two branches of same industry and is not in contravention of constitutional provision that laws of general nature shall have uniform operation. St.1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372; Const. art. 1, §§ 11, 21.

**12. Appeal and error 🔑1079**

Where no substantial argument was advanced in support of contention on appeal, Supreme Court would assume that contention was abandoned.

**13. Constitutional law 🔑62**
**Food 🔑1**

The statutes relating to stabilization and marketing of fluid milk and fluid cream and authorizing Director of Agriculture to designate marketing areas which he deems necessary or advisable in those localities "wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform" are not invalid as attempt to delegate legislative power to Director of Agriculture without standard of measurement by which Director may be guided in designating marketing areas. St.1937, p. 47, § 736; St. 1935, p. 922, § 735 et seq., as amended by St.1937, pp. 42, 151, 1989, and § 736.10 et seq., as added by St.1937, p. 1372.

**14. Constitutional law 🔑62**
**Food 🔑1**

Provision of Milk Stabilization Act that after Director of Agriculture has determined that required percentage of milk producers in any area desire stabilization and marketing plan to be formulated, Director must find that such plan is "necessary to accomplish purposes of this chapter" and providing for formulation and submission of plan to milk producers is not unconstitutional on ground that it attempts to confer upon Director of Agriculture legislative power in the formulation of a stabilization and marketing plan without standards for guidance since "purposes of this chapter" are fully set out in act and furnish adequate guide. St.1937, pp. 43, 47, §§ 735.1, 736.1.

**15. Constitutional law 🔑48**

If reasonable construction can be given to words of the statute which will render it harmonious with the Constitution, it is the duty of the court to adopt such construction.

**16. Food 🔑4**

Under provision of Milk Stabilization Act providing that petition to Director of Agriculture asking for promulgation of a plan for marketing and stabilization of milk industry must be signed by 65 per cent. of only those "producers whose major interest is in the production of milk and cream," quoted words include all producers of milk and cream except those large distributors of milk and cream who are also engaged in the business of producing milk on a small scale as compared with their distribution business, and only those producers whose major interest is the production of milk in comparison with their interest in the distribution of milk are entitled to participation at hearing to determine whether stabilization plan should be promulgated. St.1937, p. 47, § 736.1.

**17. Statutes 🔑181(2)**

Where language of a statute is reasonably susceptible of two constructions, one which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

**18. Statutes 🔑72**

The provision of the Milk Stabilization Act providing that only those producers of fluid milk or fluid cream whose major interest is in the production of fluid milk or fluid cream are to be permitted to participate in hearing to determine whether 65 per cent. of the producers desire stabilization plan to be formulated by giving all producers opportunity to be heard on final hearing is not unconstitutional on ground of lack of uniformity since distinction between those whose major interest is production of milk and those whose major interest is distribution rests upon a natural and intrinsic difference. St.1937, p. 47, § 736.1; Const. art. 1, § 11.

**19. Food 🔑1**

The provisions of the Milk Stabilization Act relating to establishment and declaration of prices for milk and fluid cream in the several marketing areas in the state are not open to objection that there is no definite rule in the act as to the fixing of prices to the producers. St.1937, p. 1373, § 736.12.

**20. Statutes 🔑47**

The provisions of the Milk Stabilization Act relating to establishment and declaration of prices for milk and fluid cream in the several marketing areas of the state are not invalid as failing to define an area where designation of marketing areas was provided for by other provisions. St.1937, p. 1373, § 736.12, subd. 1; p. 47, § 736.

**21. Food 🔑3**

Under provisions of Milk Stabilization Act relating to licensing of distributors and defining distributor, any person coming within the terms of definition of distributor is entitled in first instance to a license as such unless complaint is filed against the issuance of such license. St.1937, pp. 43, 50, 53, §§ 735.3, 737.5(a), 737.11.

**22. Constitutional law 🔑62**

The provision of the Milk Stabilization Act relating to the licensing of distributors of fluid milk or fluid cream when read with provision relating to the filing of a complaint against issuance of such license afford adequate standards to guide Director of Agriculture in refusing application for license and in revoking or suspending licenses already issued and is not an unlawful delegation of legislative power to the Director of Agriculture. St.1937, pp. 50, 53, §§ 737.5(a), 737.11.

**23. Constitutional law 🔑62**

The provision of the Milk Stabilization Act that Director of Agriculture may determine amount of damage, if any, to which a complainant is entitled as result of failure of distributor to pay for fluid milk or fluid cream as provided for by statute and may make an order directing offender to make reparation and to pay complainant such amount is unconstitutional as an attempt to clothe the Director with judicial power. St. 1937, p. 53, § 737.11(b).

**24. Statutes** ⟹64(2)

Under provision of Milk Stabilization Act that if any portion of act be unconstitutional, remaining portions shall not be affected, invalidity of provision that Director of Agriculture may determine amount of damage, if any, to which complainant is entitled as result of failure of distributor to pay for fluid milk or fluid cream as provided for by statute and may make an order directing offender to make reparation does not affect remaining valid portions of the act. St.1937, pp. 53, 1376, §§ 738, 737.11(b).

**25. Statutes** ⟹47

The provisions of the Milk Stabilization Act relating to fixing of minimum prices for fluid milk and fluid cream upon "the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk" taking into consideration additional cost incurred in producing and marketing fluid milk above costs incurred in producing and marketing manufacturing milk, provided that such prices tend to effectuate purposes and policy of act and "insure consumers a sufficient quantity of pure and wholesome milk" provide a sufficient standard for Director of Agriculture to fix minimum prices for fluid milk and cream. St.1937, p. 1989, § 736.3(b).

**26. Food** ⟹4

Under provision of the Milk Stabilization Act relating to the fixing of minimum prices for fluid milk and fluid cream on a basis of the "economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk," term "economic relationship" means that the price designated to be paid to producers by distributors for market milk shall be based upon the relative costs incurred in producing and marketing fluid milk to the cost of producing and marketing manufacturing milk. St.1937, p. 1989, § 736.3(b).

**27. Statutes** ⟹47

The provision of the Milk Stabilization Act that Director of Agriculture in fixing minimum prices to be paid to the producer for fluid milk must find "that such prices will tend to effectuate the purposes and policy of this chapter," is sufficient standard for Director's guidance where purpose is adequately set out in the statute. St.1937, pp. 43, 44, 1989, §§ 735, 735.1, 736.3(b).

**28. Statutes** ⟹47

The provision of the Milk Stabilization Act that Director of Agriculture in fixing minimum prices for milk must find that consumers will be insured a sufficient quantity of pure and wholesome milk furnishes understandable and sufficient standard to serve as a guide to the Director in discharging his duty under the act. St.1937, p. 1989, § 736.3(b).

**29. Constitutional law** ⟹62

The policy of law favors the placing of detailed responsibility in administrative officers.

**30. Constitutional law** ⟹62

To justify declaring a statute imposing particular duties upon administrative officers to be inoperative as a delegation of legislative power, it must clearly appear beyond reasonable doubt that the duty so imposed is one appertaining exclusively to the legislative department and that the delegation of it was not warranted under the Constitution.

---

In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Suit by the Jersey Maid Milk Products Company, Inc., a corporation, and others against A. A. Brock, Director of Agriculture of the state of California, to enjoin enforcement and administration of the so-called Milk Stabilization Act. From a judgment for the plaintiffs, defendant appeals.

Reversed, with directions.

U. S. Webb and Earl Warren, Attys. Gen., and Walter L. Bowers, Deputy Atty. Gen., for appellant.

John L. Flynn, of Los Angeles, for respondents.

Mark M. Cohen and Irwin M. Fulop, both of Los Angeles, amici curiae.

CURTIS, Justice.

In this action certain producers and distributors of fluid milk and fluid cream both at wholesale and retail joined with certain consumers of the same product, all in the county of Los Angeles, as parties plaintiff, and brought this action against the defendant, A. A. Brock, as Director of Agriculture of the State of California, to prevent the enforcement and administration of the so-called Milk Stabilization Act, being chapter 10, division IV, of the Agricultural Code, upon the ground that said act violates both the federal and state Constitutions. A temporary restraining order was granted ex parte and an order to show cause why a preliminary injunction should not be granted was immediately issued. Defendant appeared and filed a general demurrer which, after a hearing thereon, was overruled with permission to answer within ten days, and a preliminary injunction was granted. The defendant, resting upon his demurrer, declined to answer, and his default was regularly taken, and a formal judgment was entered permanently restraining and enjoining said defendant as director of agriculture "from in any manner whatsoever enforcing or attempting to enforce, as against the plaintiffs, or any of them, any of the terms or provisions of chapter 10, division IV, of the Agricultural Code of the State of California". From this judgment, the defendant has appealed.

As the judgment was rendered after the sustaining of a demurrer to the complaint, we shall give a brief synopsis of the complaint. Paragraphs I to VIII, inclusive, set up the character and capacities of the plaintiffs and of the defendant. Paragraph IX gives a brief history of the act in question, to which we shall refer in more detail later in this opinion. Paragraph X was stricken out by the court, and there is no paragraph XI. Paragraph XII alleges the designation by defendant, pursuant to the terms of said act, of a Los Angeles County marketing area, and the formulation of a stabilization and marketing plan for such area, under the provisions of said act. Paragraph XIII asserts the enforcement and threatened continuous enforcement of said act and the plan thus formulated thereunder. Paragraphs XIV and XV set forth the asserted damages suffered by reason of the enforced compliance with said act. Paragraphs XVI to XIX, inclusive, set forth the proceedings in another action, similar in character to the present action but by different plaintiffs, then pending in the superior court of the county of Los Angeles. Paragraph XX alleges that defendant refuses to terminate such plan and intends to continue to enforce the same. Paragraph XXI specified certain particulars in which it is alleged the act is unconstitutional and paragraph XXII is the usual allegation of the inadequacy of any remedy at law.

[1] It is apparent, therefore, that the only question presented by the pleadings is one of law, that is, whether chapter 10, division IV, of the Agricultural Code of this state is constitutional. If it is constitutional, then the complaint fails to state a cause of action, and the demurrer should have been sustained. If the act is unconstitutional, then the demurrer was properly sustained, and the judgment based upon the order overruling the demurrer should be affirmed.

The Agricultural Code was enacted in 1933. Stats.1933, p. 60. In 1935, chapter 10, division IV, was added to the code (Stats.1935, p. 922), and in 1937, various amendments were made to said chapter 10, and a new article, entitled article 2a, was added to said chapter. Stats.1937, pp. 42, 151, 1372, 1989. Article 2a (section 736.10 et seq.) purports to empower the director of agriculture, by following certain provisions of said act, to prescribe and enforce minimum wholesale and retail prices for fluid cream and fluid milk. Division IV of the Agricultural Code, section 451 et seq., is devoted exclusively to the subject of dairies and dairy products, and chapter 10 of said division IV of said code relates to the stabilization and marketing of fluid milk and fluid cream. Chapter 10 includes sections 735 to 738, both inclusive, of the Agricultural Code, and all intervening fractionally numbered sections, such as 735.1, 735.2, etc. All references to sections of said code and other provisions of said chapter 10 will be made thereto as the same were in effect after the amendment by the legislature in 1937.

Sections 735 and 735.1 are as follows:

"735. *Legislative declaration.* (a) The production and distribution of fluid milk and of fluid cream and the dissemination of accurate, scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State.

"(b) It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

"(c) It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary, and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

"(d) The foregoing statements of facts, policy and application of this law are hereby declared a matter of legislative determination."

"735.1. *Purposes of chapter: Legislative intent.* The purposes of this chapter are to:

"(a) Provide funds for administration and enforcement of this act, by assessments to be paid by producers of fluid milk or fluid cream, or both, and from licenses issued to distributors in the manner prescribed herein.

"(b) To authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State, provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

"(c) To authorize and enable the director to formulate stabilization and marketing plans subject to the limitations herein prescribed with respect to the contents of such stabilization and marketing plans and declare such plans in effect for any marketing area.

"(d) Enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

"It is the intent of the Legislature that the powers herein conferred shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices."

Section 735.2 gives to the director of agriculture authority to enforce the provisions of said chapter and any stabilization and marketing plan initiated under the provisions thereof and for that purpose to make such rules and regulations as he may deem necessary.

Section 735.3 defines certain terms used in said act, and is as follows:

"735.3. *Definitions.* As used in this chapter:

"(a) 'Board' means any local control board created as herein authorized.

"(b) 'Fluid milk' means any and all milk produced in conformity with the quality standards prescribed by the Agricultural Code for 'market milk' and for the purposes of this chapter may be classified as follows: Class 1. Any such milk which is supplied to the consumer in the natural fluid state or prepared for human consumption without being converted into any other form or product, and including milk fat used in the standardization of such milk; Class 2. Any such milk or cream derived from such milk sold or used for consumption as cream; Class 3. Any such milk or the cream derived from such milk used in the manufacture of ice cream, ice milk, flavored milk drinks, buttermilk and cottage cheese; Class 4. Any such milk or the cream derived from such milk used in the manufacture of butter.

"(c) 'Fluid cream' means any and all cream obtained from 'fluid milk,' and may include whole milk which had been purchased or acquired for the derivation of cream for consumption as cream, or which cream is to be used in the manufacture of ice cream, ice milk, flavored milk drinks, buttermilk and cottage cheese.

"(d) 'Dairy products' includes any product manufactured from milk or any derivative or product of milk.

"(e) 'Producer' means any person who produces fluid milk or fluid cream in conformity with the applicable health regulations of the place in which it is sold.

"(f) 'Distributor' means any person whether or not such person is a producer or an association of producers, engaged in the business of distributing or handling fluid milk or fluid cream for sale, including persons (a) who pasteurize, bottle or process fluid milk or fluid cream; (b) who distribute fluid milk or fluid cream at wholesale, retail or otherwise (1) to hotels, restaurants, stores or other establishments for consumption on the premises, (2) to stores or other establishments for resale, or (3) to consumers.

"(g) 'Retail store' means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business where fluid milk or fluid cream is sold to the general public for consumption off the premises.

"(h) 'Marketing area' is any area within this State declared to be such in the manner prescribed in this chapter.

"(i) 'Stabilization and marketing plan' means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

"(j) 'Consumer' means any person who purchases fluid milk, fluid cream or dairy products for consumption.

"(k) 'Person' means any individual, firm, corporation, association or any other business unit."

Passing over certain sections of the chapter for the time being, we find that by section 736 it is provided that: "As soon as possible after the effective date of this chapter the director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter."

Respecting the formulation of a stabilization and marketing plan for any area after it has been designated by the director, it is provided in section 735.4 of said chapter that the director shall have the power "To formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan".

The proceedings leading up to the formulation of a stabilization and marketing plan for any area are provided for in section 736.1 of said code as follows: "The director shall, prior to the formulation of a stabilization and marketing plan for any area, conduct a hearing in said area for the purpose of determining whether or not the producers who produce sixty-five per cent of the fluid milk for said area and whose major interest is in the production of fluid milk for said area or of the producers who produce sixty-five per cent of the fluid cream for said area and whose major interest is in the production of fluid cream for the area desire that a stabilization and marketing plan as to fluid milk or fluid cream be formulated for such area; but if a petition for a plan is presented by the producers who produce sixty-five per cent of the fluid milk for said area and whose major interest is in the production of fluid milk for said area or by the producers who produce sixty-five per cent of the fluid cream for said area and whose major interest is in the production of fluid cream for the area, it shall not be necessary that such hearing be held. If the director finds that a stabilization and marketing plan is necessary to accomplish the purposes of this chapter, he shall formulate a stabilization and marketing plan for fluid milk or fluid cream or both for such area and issue a notice of public hearing upon the plan formulated to all producers and distributors of record with the Department of Agriculture who may be subjected to the provisions of such plan. The notice of hearing may be effected by mail, or by publication for five successive days in a newspaper of general circulation in the area designated and shall specify the time and place of such hearing, which shall not be held prior to ten days from the mailing, or from the final publication of such notice; provided, however, that if no daily newspaper of general circulation is published in the area designated, publication of notice for two successive weeks in a weekly newspaper of general circulation in the area will be considered proper publication of notice. At the hearing, interested parties shall be heard and records kept of the proceedings of such hearing for determination by the director whether the plan proposed will accomplish the purposes of this chapter. If, after public hearing the director determines that the proposed plan will tend to accomplish the purposes of this chapter within the standards herein prescribed, he shall issue an order to all producers and distributors of record with the director, and subject to the provisions of such plan, declaring such plan in effect within 30 days from the date of such hearing."

By section 736.3, it is provided that any stabilization and marketing plan shall contain the following provisions:

"(a) Unfair practices. Provisions for prohibiting distributors from engaging in the unfair practices hereinafter set forth:

"(1) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

"(2) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing the fluid milk or fluid cream business of any customer.

"(3) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream of like quantity under like terms and conditions.

"(4) The false or misleading advertising of fluid milk or fluid cream as defined in section 654a of the Penal Code.

"(5) The purchase of any fluid milk in excess of one hundred gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period; the quantity of such milk to be paid for as Class 1, and Class 2, and the price to be paid for each of the several classes, but in any marketing plan where an equalization pool is in operation such contract need not specify the quantity of the several classes. The contract shall also state the date and method of payment, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with this chapter. A signed copy of such contract shall be filed by the distributor with the director within five days from the date of its execution.

"(b) Minimum prices. Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for fluid milk in one or more of the various classes; provided, however, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk;

and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk."

Article 2a of said chapter which, as we have seen, was added thereto by the legislature in 1937, vests authority in the director to prescribe and enforce minimum wholesale prices and minimum retail prices for the marketing of fluid milk and fluid cream, and the first three sections of this article are as follows:

Section "736.10. *Authority of director.* Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale prices and minimum retail prices as hereinafter set forth."

Section "736.11. *Designation of prices in marketing areas.* The director shall, as soon as possible after the effective date hereof, in all marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

"(a) Minimum wholesale prices which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor; and

"(b) Minimum retail prices which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

"At the time any stabilization and marketing plan is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, such minimum wholesale prices and such minimum retail prices; provided, however, that all prices established under the terms of this article shall be such prices as are determined by the director pursuant to the provisions of section 736.12."

Section "736.12. *Determination of prices; Investigation: Hearings: Notice and Record: Factors to be considered: Establishment and declaration of prices: Restrictions.* In determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed. In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony and may subpoena witnesses. All testimony received at such hearings shall be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or files a request for the same with the department, by mail or by publication for the time and in the manner prescribed in section 736.1 of this chapter. A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

"Factors to be considered. In determining minimum wholesale and minimum retail prices for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area:

"(1) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

"(2) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

"(3) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

"(4) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and delivery, as such costs are determined by impartial surveys or audits, or both, of the books and records of all, or such portion of the distributors and retail stores of each type or class in such marketing area as are found by the director to be representative to indicate the costs of all distributors and retail stores in such marketing area.

"(5) The amount of the available capacity for processing and distributing fluid milk, or fluid cream, or both, of all distributors and retail stores in such marketing area and the estimated extent to which such available capacity is being used by such distributors and retail stores.

"(6) The purchasing power of consumers in such marketing area.

"Establishment and declaration of prices: Restrictions. Following such hearings, investigations and examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area, and shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective, provided that the director finds, in writing, with respect to such prices.

"(1) That such prices are sufficient, but not more than sufficient, to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk, fluid cream, or both, in such marketing area as such necessary costs of reasonably efficient distributors and retail stores are shown to the director by the facts available to the director from the investigations, surveys, audits, and hearings required in this section.

"(2) That such prices will tend to maintain in the business of distributing fluid milk and fluid cream, or both, such number of reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds is necessary to insure to consumers in such marketing area sufficient distribution facilities of the several types or methods commonly used by consumers.

"(3) That such prices will protect the interests of consumers of fluid milk, fluid cream, or both, in such marketing area by insuring to them adequate and efficient distribution facilities of the several types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk, fluid cream, or both, than is necessary to maintain such adequate and efficient distribution facilities in such marketing area."

The other sections of this article prohibit sales at less than the established prices and provide for the payment of a fee by each distributor, and for the appointment of a local control board in each area to assist and advise the director in matters pertaining to the marketing, distribution and sale of fluid milk or fluid cream, or both, in said areas. There are still a number of other sections in said chapter which may be later discussed in case any question is raised respecting their meaning, validity, or applicability.

Originally this case as it came before us was briefed by the attorney-general on behalf of the director of agriculture, as appellant, and the attorney for the respondents. Just prior to the argument of the case, leave was given to amici curiae to file a brief in support of the position taken by the respondents. To this brief, the attorney-general has filed a reply. In our discussion of this case, we shall endeavor to cover all points raised by either the respondents or by the amici curiae without reference to any order in which these points are set forth in the respective briefs.

As noted above, the sole question presented on this appeal is the constitutionality of chapter 10 of division IV of the Agricultural Code of this state. No exception is taken to any procedural steps pursued by the director of agriculture in the designation of the area consisting of the county of Los Angeles, as the "Los Angeles County Marketing Area", or in the formation of a stabilization and marketing plan for said area; nor is any contention made that said director has not proceeded in strict compliance with the terms of said chapter 10 in each and every act on his part to be performed leading up to and including the determination and fixing of the minimum wholesale and retail price to be charged for fluid milk and cream within said Los Angeles county area.

[2-4] It hardly seems necessary in discussing the constitutionality of said measure to call attention to the well-established and universally recognized principle of law that all presumptions and intendments are in favor of the constitutionality of a statute enacted by the legislature; all doubts are to be resolved in favor and not against the validity of a statute; that before an act of a coordinate branch of the government can be declared invalid by the

judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable; and in case of a fair and reasonable doubt as to its constitutionality, the statute should be upheld and the doubt resolved in favor of the expressed wishes of the people as given in the statute. 5 Cal.Jur., p. 628; Legal Tender Cases, 12 Wall. 457, 531, 20 L.Ed. 287; Sinking-Fund Cases, Union P. R. Co. v. United States, 99 U.S. 700, 718, 25 L.Ed. 496; Trade-Mark Cases, United States v. Steffens, 100 U.S. 82, 96, 25 L.Ed. 550; In re Spencer, 149 Cal. 396, 400, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105; People v. Globe Grain & Mill. Co., 211 Cal. 121, 127, 294 P. 3.

[5-7] The first contention made against the validity of chapter 10 by the respondents, in which the amici curiae join, is that it is unconstitutional as an improper exercise of the police power of the state in violation of the due process clause of the federal Constitution, U.S.C.A.Const. Amend. 14. In this connection, it is argued that the milk industry is not clothed with a public interest and, therefore, the legislature is powerless to regulate it under the police power of the state. The question as to whether the milk business bears such a relation to the welfare of those dependent upon its use as to be clothed with a public interest has been, in our opinion, set at rest by the decision of the United States Supreme Court in the case of Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469. That case has been so recently and frequently reviewed by this court (Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 456, 55 P.2d 177; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 576, 55 P.2d 495, and Wholesale Tobacco Dealers Bureau, etc. v. National Candy & Tobacco Co., 11 Cal.2d 634, 647, 82 P.2d 3, 118 A.L.R. 486), that any extended reference to it at this time seems unnecessary. That case is particularly applicable to the instant action as the court not only held that the milk business was "clothed with a public interest" [291 U.S. 502, 54 S.Ct. 514] and was therefore subject to regulation by the legislature, but it also held that the power to regulate extended to and included the power to fix the price at which milk might be sold. In the course of its opinion, the court said (291 U.S. page 532, 54 S.Ct. page 514, 78 L.Ed. 940, 89 A.L.R. 1469): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago." Further on in its opinion, the court states (291 U.S. page 537, 54 S.Ct. page 516, 78 L.Ed. 940, 89 A.L.R. 1469): "But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." We have followed the Nebbia case in our previous decisions, and the principles of law therein announced must be held to be firmly and finally established in this state. The decisions relied upon by both respondents and amici curiae were rendered prior to the decision in the Nebbia case, and cannot at this time be considered as authoritative declarations of the law announced in that decision. Amici curiae seek to distinguish the Nebbia case from the instant case, and particularly call our attention to the fact that the New York statute was of a temporary duration while the California act is without any limitation as to duration, but they fail to show how this difference in the two statutes does in any way divest the legislature of the power to protect an industry from a perilous condition which is permanent in character. Furthermore, the rule appears to be well established that, "Failure by the Legislature to limit the operation of the law to a definite term does not render the law invalid so long as the conditions which justify the passage of the law remain." People by Van Schaick v. Title & Mortgage & Guarantee Co., 264 N.Y. 69, 190 N.E. 153, 162, 96 A.L.R. 297.

In addition to the Nebbia case, the following authorities hold that it is within the police power of the state to regulate the milk industry by fixing the prices which may be charged therefor: Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; Franklin v. State, 232 Ala. 637, 169 So. 295; Miami Home Milk Producers Ass'n v. Milk Control Board, 124 Fla. 797, 169 So. 541; Bohannon v. Duncan, 185 Ga. 840, 196 S.E. 897; Albert v. Milk Control Board, 210 Ind. 283, 200 N.E. 688; State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116; Rohrer v. Milk Control Board, 322 Pa. 257, 186 A. 336; Reynolds v. Milk Commission, 163 Va. 957, 179 S.E. 507; State v. Lincoln Dairy Company, 221 Wis. 1, 265 N.W. 197, 851.

[8] The Nebbia case is not only decisive of the questions just discussed but settles many of the general principles applicable to and governing the power of the legislature to enact regulatory legislation like that embodied in chapter 10 of division IV of the Agricultural Code. Having, therefore, held that under the police power of the state the legislature may regulate the marketing of fluid milk, and may even fix the price at which it may be sold, the only other question that can possibly arise in passing upon said chapter 10 as a whole must necessarily relate either to the alleged discriminatory provisions of the code, or to the procedural steps required to be taken by the director of agriculture to put into effect and to enforce said regulations.

Under the claim that the act is discriminatory, it is contended that chapter 10 is unconstitutional because all persons engaged in the milk business are not subject to its terms. Chapter 10 purports to regulate the producer, the distributor, and the consumer, in connection with fluid milk and fluid cream, but does not apply to the producer, the distributor, or the consumer of any other class or kind of milk or cream.

[9] "Fluid milk" as defined by the Agricultural Code means "any and all milk produced in conformity with the quality standards prescribed by the Agricultural Code for 'market milk'" and includes both fluid milk and fluid cream. Sec. 735.3. "'Market milk' is milk which is supplied to the consumer in the natural fluid state, or prepared for human consumption without being converted into any other form or product, as distinguished from manufacturing milk." Sec. 479 of the Agricultural Code. This section of the code also prescribes the quality standards in conformity with which "market milk" must be produced. Among these standards is one requiring that all "market milk" shall be produced from nonreacting tuberculin tested cows or goats, and others require that all "market milk" sold to the retail trade shall be contained in standard milk bottles which have been mechanically filled and capped, in a properly designed, equipped and approved milk room, and that all receptacles used to contain "market milk" shall be washed, sterilized, etc. By these provisions of the Agricultural Code, "fluid milk" means the same as "market milk" and includes fluid cream as well as fluid milk. It is apparent, therefore, that the legislature has divided the milk industry into two classes, one class including all those engaged in producing, distributing, and consuming market or fluid milk and those dealing in manufacturing milk. It may be stated here that the Agricultural Code does not define "manufacturing milk" but from the language of section 479 of the Agricultural Code, we understand that it comprises and includes all milk supplied or prepared for human consumption, except market or fluid milk.

[10] In support of respondents' contention that the act is unconstitutional because it discriminates between these two classes of persons, respondents cite section 11, article I, and section 21 of article I of the Constitution. Section 11 of article I provides that: "All laws of a general nature shall have a uniform operation." A statute is uniform in its operation if it applies alike to all persons or objects within a class founded upon some natural, intrinsic, or constitutional distinction. Vail v. San Diego County, 126 Cal. 35, 58 P. 392; Heron v. Riley, 209 Cal. 507, 289 P. 160, and People v. Dawson, 210 Cal. 366, 292 P. 267, 268. In the last cited case, this court has stated this well established rule as follows: "A general rule, and one which has been so universally followed as to require no citation of authority therefor, is that, where a statute is made to apply equally as to all persons embraced within a natural class, the constitutional provisions directed against special legislation, lack of uniformity in the operation of the law, and the like, are not violated."

[11] It might be well to note here that section 479 of the Agricultural Code was enacted in 1933 and was in force some two years prior to the enactment of chapter 10 of division IV of the code, and four years prior to the enactment of article 2a of said chapter. As we have seen, this section of the code divides milk into two separate and distinct classes, market or fluid milk, and manufacturing milk. Fluid milk embraces all forms of fresh milk and cream either in its natural state or prepared for human consumption. It must meet the require-

ments of certain fixed standards of quality, a few of which are enumerated above. Fluid milk must be produced fairly close to the locality where it is consumed. The time intervening between its production and consumption must, necessarily from its very nature, be of extremely short duration. Unless it meets these standards of quality, or other equally necessary, in many cases it would be unfit for human consumption. The same injurious result would follow if its delivery from the producer through the distributor to the consumer was not made promptly and at regular intervals. These standards of quality and marketing requirements which are made applicable, or which apply to the marketing of fluid milk, are neither required, nor from its nature should be required, of manufacturing milk. The division of the milk industry into the two classifications, one governing the marketing of fluid milk, and the other applying to manufacturing milk, is therefore founded upon a natural distinction existing between the two branches of the same industry. Chapter 10 of division IV is made applicable to all persons engaged in the business of marketing fluid milk, and as it is uniform in its operation upon all members of that class, it is not at variance with section 11 of article I of the Constitution which requires that all laws of a general nature shall have uniform operation.

Section 21 of article I of the Constitution provides: " * * * nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens". As we have seen the provisions of the Agricultural Code relative to the stabilization and marketing of fluid milk applies to all persons engaged in the marketing, distributing and consumption of milk of that class, and it has been held that where a statute applies to all persons or things within a definite class, and the classification of such persons or things is based upon some constitutional or natural or intrinsic distinction, the statute is not violative of this section of the Constitution. Martin v. Superior Court, 194 Cal. 93, 100, 227 P. 762. We, therefore, conclude that the act in question is not violative of either of the two sections of the Constitution quoted above.

[12] It is contended further that the act (chapter 10) imposes an unequal burden on the consumers. No substantial argument is advanced in support of this contention, and for that reason we assume that this contention has been abandoned by respondents.

We shall now pass to the consideration of those objections to said chapter 10 which are based upon the contention that certain provisions of the act prescribing the procedural steps to be taken by the director of agriculture, in order to put into effect and to enforce a stabilization and marketing plan, are in contravention to certain constitutional limitations, and are therefore illegal and void.

Amici curiae join with respondents in contending that chapter 10 of division IV is unconstitutional and void because in a number of instances it attempts to delegate legislative powers to the director of agriculture. The first section assailed on that ground is section 736.

By section 736 it is made the duty of the director of agriculture to designate marketing areas which he deems necessary or advisable to effectuate the purpose of said chapter 10. The invalidity of this section of the act, it is contended, is due to the fact that there is no designation of any standard of measurement in the act by which the director may be guided in designating marketing areas. In other words, it is claimed that this section of the act leaves the designating of the marketing area solely and entirely in the uncontrolled discretion of the director of agriculture. If such is the effect of this section without any limitation or direction in the exercise of the power so given, then it is void as an attempt to delegate legislative power to an administrative officer. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703; Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am.St.Rep. 122; Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A., N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750. However, this section of the act further provides that the director of agriculture may establish market areas only in those localities "wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform". It is the position of the appellant that this section of the code, including that portion just quoted, lays down a sufficient standard for the guidance of the director in designating various marketing areas in the state. By this section, the director is not given the unlimited power to designate areas which he deems necessary or advisable to effectuate the purposes of chapter 10, but his power is limited to designating areas only in those localities wherein the conditions affecting the production, distribution, and sale of fluid milk and cream are reasonably uniform. Uniformity of conditions under which milk and cream are produced and sold would seem to be a sufficient standard to guide the director in designating marketing areas for the sale of these products.

In the case of Dominguez Land Corporation v. Daugherty, 196 Cal. 468, 484, 238 P. 703, 709, we find the following statement of the law relative to the power of the legislature to delegate authority to an administrative officer. "'A more difficult problem is involved in the question whether there is an improper delegation of legislative power. It is well settled that the Legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the Legislature for his governance. A familiar illustration is where the Legislature enacts a law prescribing that the rates to be charged by a public utility shall be "reasonable," and creates a commission with power to investigate and fix the rates.'"

[13] In the instant case the legislature has conferred upon the director of agriculture the power to designate marketing areas wherein he finds the conditions affecting the fluid milk industry reasonably uniform. The legislature has thus established uniformity of marketing conditions as the standard for the establishment of a marketing area and has committed to the director the power to determine the areas wherein such uniformity exists. Uniformity of marketing conditions in the fluid milk industry is, in our opinion, a sufficient standard for the guidance of the director in designating marketing areas, and is supported by the decision of this court in the Dominguez Land Corporation case, and also by the following authorities: Federal Radio Commission v. Nelson Bros., etc., 289 U.S. 266, 279, 285, 53 S.Ct. 627, 77 L. Ed. 1166, 89 A.L.R. 406; People v. Associated Oil Company, 211 Cal. 93, 107, 294 P. 717; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 569, 55 P.2d 495; Brock v. Superior Court, 9 Cal.2d 291, and cases cited therein on page 296, 71 P.2d 209, 114 A.L.R. 127; also Whittier Mutual Orange & Lemon Association v. Agricultural Prorate Com., 11 Cal.2d 470, 473, 80 P.2d 983.

The authorities relied upon in behalf of the respondents may be easily distinguished from those just cited. The strongest of these cases in favor of respondents is that of Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 49 P.2d 1140. We showed the inapplicability of that case to a situation like that existing in the present case in our opinion in the Agricultural Prorate Case, 5 Cal.2d 550, 571, 55 P. 2d 495, and refused to follow it in the Brock case, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127.

As section 736 of the Agricultural Code provides a reasonably definite standard to guide the director of agriculture in establishing marketing areas for the marketing of fluid milk, there is no delegation of legislative power to the director in the performance of his duties respecting the establishment of marketing areas throughout the state.

This section also provides that the director may establish additional areas and may modify existing areas when he deems it necessary to do so. In establishing new areas, or in modifying existing areas, the director would be guided by the same standard as that fixed for his guidance in establishing original areas—that is, uniformity of marketing conditions in the fluid milk industry. The question as to the establishment of new areas, or the modifying of existing areas, is not before us in the present proceeding as it is not alleged in the complaint that the director has either established new areas or has modified existing areas.

[14] The next contention made is that section 736.1 is unconstitutional in that it attempts to confer upon the director of agriculture, legislative power in the formulation of a stabilization and marketing plan for an area after an area has been established by the director as provided by section 736 of the Agricultural Code. It is contended that neither in section 736.1, nor in any other section of the code, has any standard been provided for the guidance of said director in the formation of such a plan. A careful reading of this section of the code convinces us that this contention cannot be sustained. The director of agriculture by this section is required to act in two instances. After he has determined that the required percentage of milk producers in any area desire that a stabiliza-

tion and marketing plan be formulated, the director must find that such a plan is "necessary to accomplish the purposes of this chapter". He then formulates a plan and submits it at a hearing to the milk producers of the area for the purpose of determining whether the proposed plan will accomplish the purposes desired. The section then provides that, "if, after public hearing the director determines that the proposed plan will tend to accomplish the purposes of this chapter within the standards herein prescribed, he shall issue an order" declaring the plan in effect after 30 days from the date of said hearing. It will be noted that in each of the two instances in which the director is required to act, he can only act after finding that the proposed plan is necessary in one instance, and in the other, that it tends to accomplish "the purposes of said chapter". It is argued that the "purposes of this chapter" are too indefinite and uncertain to constitute a standard or guide to the director in acting either in determining that a plan is necessary for the area, or that the plan proposed by him will accomplish the required purposes. Generally speaking, this argument would have considerable force, but in the present instance, we are of the opinion that we cannot follow it. Section 735.1 of the Agricultural Code sets out definitely and specifically the "purposes of said chapter". No uncertainty can exist as to what was intended by the words, "purposes of this chapter" as they are explicitly defined in section 735.1. They are four in number and are designated as, a, b, c, and d. It is not necessary to set them out again at this time, as the entire section has already been quoted herein.

The situation here is much like that found to exist in the Agricultural Prorate Act which provides that a prorate plan after its preparation by the prorate program committee must be approved by the prorate commission, and that the commission before approving it, "must find that the same is reasonably calculated to maintain the existence of the facts specified in section 10 hereof". St.1935, p. 1537, § 18.1. It was contended that the Prorate Act giving the commission the authority to put into effect a prorate plan was a delegation of legislative power to the committee as no standard was fixed by the act to guide the committee in the preparation of such a plan. We held, however, that "Section 10 of the act sets forth seven essential facts which must be made to appear before any prorate district or zone is organized. These seven basic facts are the very foundation of every proceeding for the formation of a prorate district, and every one of them must be found by the commission to exist, or the petition must be denied. As the program must conform to these legislative requirements, we think it cannot be said that no standard has been provided by the Legislature to guide the program committee in framing a proposed program." [5 Cal.2d 550, 55 P.2d 504.] So under section 736.1 of the Agricultural Code, the director must in the first instance find that a stabilization and marketing plan is necessary to accomplish the purposes of said chapter as set forth in section 735.1 of the act, before he formulates any plan, and after it has been formulated, at a hearing of which the milk producers and distributors in the area are given notice, he must determine whether the plan proposed meets the standards fixed by said section of the code defining the "purposes of said chapter".

[15] It is also contended that section 736.1 is unconstitutional in that it is not uniform in its operation in respect to the producers of milk and cream, who are to have a voice in determining whether a stabilization and marketing plan is desired by the producers in any particular area. By reading said section, it will be noted that only those producers of fluid milk or fluid cream, whose major interest is in the production of fluid milk or fluid cream, are permitted to participate in the hearing to determine whether sixty-five per cent of the producers desire that a stabilization plan be formulated, and in case a petition to the director is presented asking for the promulgation of such a plan, it needs to be signed by sixty-five per cent of only those producers *whose major interest is in the production of milk and cream.* There are at least two possible constructions that may be given to these italicized words. Respondents and amici curiae contend that they mean those producers whose major interest is in the production of milk rather than in the production of other commodities, or those producers whose major interest is in the production of milk, as compared with their interest in other lines of business. As an example of this first class, they cite the owner of a large farm or ranch devoted to the raising of fruit, grain, horses, cattle, and other farm products. He also maintains a dairy, and produces

large quantities of milk and cream which he sells to the trade. But his dairy is only a small part of the business transacted by him on his farm or ranch. In fact, the production of milk is only a minor interest when compared with the business transacted by him on his entire farm. An example of the second class would be an individual of large means, or a large corporation, owning extensive interests in bank, mining, and farming, including a dairy which produces large quantities of milk and cream which is sold to the trade. But this dairy business constitutes only a very small per cent of this business interest as a whole, and the production of milk and cream is only a minor interest when compared with the entire business transacted. Under respondents' construction of the phrase, "whose major interest is the production of milk and cream", these two classes of producers would be excluded from having any voice in deciding whether a stabilization plan in the area for which they produce milk and cream is desirable. Under such a construction, the section would be subject to the charge of unconstitutionality on the ground that it does not operate uniformly upon all persons engaged in the business of producing milk and cream. We can think of no reason which would have induced the legislature to enact such a statute if it be given the construction placed upon it by the respondents and amici curiae. It would, in fact, be an absurd legislative act. No reason has been suggested to us, and we have not been able to discover any reason, why the legislature would exclude the two classes of producers which we have just described, and perhaps others, from all the rights and privileges enjoyed by other producers whose interests are identical with those of the two excluded classes. To so construe this language of the section would render the section unconstitutional on the ground of lack of uniformity. If, therefore, there is any other reasonable construction which can be given to these words of the section, and which will render it harmonious with the Constitution, it is the duty of the court to adopt such construction. 5 Cal.Jur., p. 615. We shall, therefore, turn to the construction which the attorney-general contends is the proper construction to be placed upon the words, "whose major interest is in the production of milk and cream".

[16, 17] Preliminary to the consideration of the contention of the attorney-general as to the construction to be given to the phrase in question, we would call attention to the provision of section 736.1, in which said phrase is found, that the purpose of the proposed hearing, and the purpose of the petition provided for in said section, is to determine whether sixty-five per cent of the producers desire a stabilization plan formed in the area for which they furnish milk and cream. Three classes of persons are interested primarily in the milk industry, the producers, the distributor, and the consumer. These terms are defined in section 735.3 of the Agricultural Code as follows: The "producer" means "any person who produces fluid milk or fluid cream in conformity with the applicable health regulations", etc. The "consumer" means "any person who purchases fluid milk, fluid cream or dairy products for consumption." The "distributor" means "any person whether or not such person is a producer or an association of producers, engaged in the business of distributing or handling fluid milk or fluid cream for sale * * *." By this section of the code a distributor is one engaged in the distribution of milk *and includes producers who are also engaged in the distribution of milk.* By this section of the code, producers are of two classes—one class engaged solely in the production of milk, and the other class engaged both in the production and in the distribution of milk. The contention of the attorney-general is that when the phrase, "producers of milk whose major interest is in the production of milk" is used in section 736.1, the legislature had in mind those producers who were also engaged in the distribution of milk, and provided that only those producers "whose major interest is in the production of milk", in comparison with their interest in the distribution of milk should be entitled to participation at the hearing to determine whether a stabilization plan should be promulgated by the director of agriculture. It cannot be questioned, we think, that such a construction of the words in said phrase is justified when this section is read in conjunction with the definitions given to "producer" and "distributor" in section 735.3 of said code. As so construed, it would include the farmer who is engaged in diversified farming, including the operation of a dairy, although his dairy interest may be small when compared with his other farming interests. It would also include the producer who carries on a dairy business

in connection with his other business activities, although his dairy business may be only a minor interest in comparison with his business as a whole. In fact, such a construction would include all producers of milk and cream except those large distributors of milk and cream who also engaged in the business of producing milk on a small scale as compared with their distribution business. We see nothing unreasonable in so construing the phrase in question. In fact such a construction appears to us to be entirely justified and reasonable. "Where the language of a statute is reasonably susceptible of two constructions, one which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." 23 Cal.Jur., p. 766. And as so construed, section 736.1 cannot be held to lack uniformity of operation as it affects all producers of milk whose primary interests would be directly affected by the establishment of a marketing plan.

[18] It may be contended that a producer whose interest in the production of milk is a minor interest in comparison with his distributing business, also has an interest in the outcome of the hearing to determine whether a stabilization plan is to be promulgated in the area for which he furnishes milk. Conceding that to be so, his interest is basically different from that of the producer who is not a distributor, and whose major interest is in the production rather than the distribution of milk. In fact, the interest of the former would naturally be adverse to the interest of the latter. The distinction between producers whose major interest is in the production of milk and those whose major interest is in the distribution of milk rests upon a natural and intrinsic difference between the two classes, and a statute which affects one of these classes, and does not affect the other, cannot be held to be unconstitutional by reason of its lack of uniformity.

The only purpose of this hearing is to ascertain whether the producers in the area desire a stabilization plan promulgated by the director. If, at this hearing, the director finds that the promulgation of such a plan is necessary to accomplish the purposes "of this chapter", he formulates a plan and gives notice of a public hearing to producers and distributors alike to determine whether the proposed plan will accomplish the purpose desired. The first hearing, that is, the one at which producers only are entitled to participate, is only preliminary to this second hearing at which the plan proposed by the director is adopted. As all producers and distributors have the right to participate in the final meeting at which the plan is adopted, none can complain that he is deprived of any right without an opportunity to be heard.

[19] Respondents make the contention that there is no definite rule in the act as to the fixing of prices to the producers. This subject is governed by the provisions of section 736.12 of the Agricultural Code, and the only authority cited in support of the claim here made is the case of Balzer v. Caler, Cal.App., 74 P.2d 839. That case after decision by the District Court of Appeal was transferred to this court. In our decision, we arrived at an entirely opposite conclusion from that of the District Court of Appeal. Balzer v. Caler, 11 Cal.2d 663, 82 P.2d 19. The opinion, therefore, of the District Court of Appeal having been set aside by said transfer is of no authoritative value.

[20] Respondents' criticism of this section is particularly and specifically directed to subdivision (1) of said section under the heading of "Establishment and declaration of prices: Restrictions". This subsection provides for the fixing of prices in the several marketing areas in the state. Respondents complain that there is no definition in the act of an area and nothing to determine of what an area shall consist. Section 736 provides for the designation of marketing areas in the several parts of the state, and we have already discussed the validity of that section, and what we have there said answers the present criticism of respondents respecting the formation of areas.

[21] Amici curiae also attack as unconstitutional section 737.5(a) of said code on the ground that it is an unlawful delegation of legislative power to the director of agriculture. Section 737.5 provides in part that "(a) After thirty days after the effective date of this chapter, no distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director." It is contended that this section provides no standard by which the director may be guided in issuing licenses to distributors. Section 735.3, as we have seen, defines "distributor". The definition in part is as follows: "'Distributor' means any per-

son whether or not such person is a producer or an association of producers, engaged in the business of distributing or handling fluid milk or fluid cream for sale," etc. As the section explicitly defines a distributor, we apprehend that any person who comes within the terms of this definition would in the first instance be entitled to a license as a distributor, unless a complaint was filed against the issuance of said license as provided by section 737.11. Highland Farms Dairy v. Agnew, D.C., 16 F.Supp. 575, 584. In that opinion it is stated under a somewhat similar act, "In the absence of provision to the contrary, it would appear to be the duty of the board to issue a license * * * until some violation of the act or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act, although less specific in detail than other similar statutes."

[22] These two sections, 737.5 and 737.11, should be read together, and when so read, it will be found that they afford adequate standards not only to guide the director in refusing an application for a license but also in revoking or suspending licenses already issued. Section 737.11 reads in part as follows: "(a) The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any *applicant* or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter." It will be noted that this section refers to an *applicant* for a license as well as to a *licensee*. As we construe this section, the applicant may not be granted a license if the director finds, after a hearing, that he has violated any of the provisions of the chapter or any plan promulgated thereunder. He may also revoke or suspend a license for the same reason.

It is contended by amici curiae that that portion of section 737.11(a) which provides for a hearing after complaint filed only applies to proceedings for the revocation or suspension of a license and does not apply to the granting of a license. We concede that the section is not as clear as it might be, but the inclusion of the word "applicant" in the section clearly implies that the proceedings therein provided for applies to a person applying for a license as well as a licensee whose license is sought to be revoked or suspended. Subsection (b) of this same section confirms our conclusion that this section applies both to an applicant for a license, as well as to a licensee, as it is therein stated that "Such decision [the decision rendered after the hearing provided for in subsection (a) of said section] may include an order *refusing,* revoking or suspending *the license applied for* or held by the respondent". Subdivision (b). As we construe these sections, they provide that a license may not be granted by a director after a complaint filed, if after a hearing held upon said complaint, the director finds that the applicant has violated either the terms of the act or the provisions of an established marketing plan. It cannot be said, therefore, that the granting or refusing of a license is left to the arbitrary whim of the director, as a license to any applicant, if complaint is made against its issuance, can only be granted after the hearing provided in section 737.11(a) of said code, and a finding made in favor of the applicant.

[23, 24] The same parties attack that portion of said section which provides that, "Such findings and order may determine the amount of damage, if any, to which a complainant is entitled as a result of a failure of the distributor to pay for fluid milk or fluid cream as in this chapter provided, and in such case the director may make an order directing the offender to make reparation and pay to such person complaining such amount on or before the date fixed in the order." Subd. (b). It is contended that by this provision of said section the legislature has attempted to clothe the director with judicial power, and that the provision is unconstitutional for that reason. There can be no answer to this contention. No citation of authority is necessary to support the same. While the attorney-general does not concede the invalidity of this provision of said section, he makes no attempt to defend its constitutionality, and we must therefore assume that he recognizes the serious defect in this provision of said section. But even if said provision is contrary to the terms of the Constitution, its invalidity can in no wise affect the remaining valid provisions of said chapter 10. Section 738 of said chapter provides that if any portion of said chapter shall be held to be unconstitutional, such decision shall not affect the validity of the remaining portions thereof.

Section 736.3 of the Agricultural Code provides for various "provisions" to be contained in any stabilization and marketing plan promulgated by the director of agriculture, some of which are optional. Among the provisions required to be included in such a plan, and which we may designate as mandatory, is the following: "(b) Minimum prices. Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for fluid milk in one or more of the various classes; provided, however, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk; and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk."

Amici curiae criticize this provision of said section on the ground that it confers upon the director of agriculture authority to fix the minimum prices to be paid by distributors to producers for fluid milk in the various areas throughout the state without providing any adequate standard by which the director is to be guided in fixing said minimum prices. They concede that this section (sec. 736.3 (b) does provide "that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional cost incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk; and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk".

Undoubtedly the legislature by this last quoted provision of said section has attempted to fix certain standards which the director is required to follow in fixing minimum prices for fluid milk to be paid to the producers by the distributors. We have in a previous part of this opinion called attention to the division by the legislature of the milk industry into two classes—one class including all those engaged in the producing, distribution and consumption of market milk, and those similarly interested in manufacturing milk. We further called attention to certain provisions of the agricultural code respecting the production and preparation of market milk before it could be sold "to the retail trade". We also pointed out certain conditions under which market milk, in order to be fresh and wholesome, must be furnished to the consumer. The strict requirements under which market milk must be produced and prepared before the same is permitted to be sold "to the retail trade" and the conditions which naturally govern the distribution of such a perishable and unstable article do not in any way apply to or affect manufacturing milk. Manufacturing milk therefore may be produced and sold at a much lower price than market milk.

[25, 26] In designating the minimum price of market milk it is required that the price so designated shall be based upon the "economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk". It is contended that the term, "economic relationship" is indefinite and too uncertain to form any standard by which the director may be guided in fixing the minimum price to be paid for fluid milk. This term is not defined in any provision of the Agricultural Code, and we have been unable to bring to light any judicial interpretation of its meaning. We think, however, that the section itself fairly indicates what was in the mind of the legislature in the use of the term, "economic relationship". It provides that the minimum price of fluid milk, so designated by the director, shall be based upon the economic relationship of the price of fluid milk to the price of manufacturing milk (by) "taking into consideration the additional cost incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk". We have inserted the preposition, "by" in the sentence not for the purpose of changing its meaning, but possibly to make its meaning clearer. As thus read, this provision simply means that the price designated to be paid to producers by distributors for market milk shall be based upon the relative costs in-

curred in producing and marketing fluid milk to the cost of producing and marketing manufacturing milk. It was evidently the purpose of the legislature to stabilize the milk industry in the distribution of these two classes of milk so that there would be a sufficient quantity, but not an over-supply of each class. For, if the minimum price of fluid milk be fixed too low, then the producers would not go to the expense necessary to meet the health and sanitary requirements of fluid milk and would dispose of their product as manufacturing milk, and there would not be a sufficient supply of wholesome milk for the use of consumers. On the other hand, if the price of fluid milk be fixed too high, the effect would be to increase unduly the supply of fluid milk with the result that many producers would be unable to market their product, and for that reason would be forced out of business. Such a result might, and probably would, endanger an adequate supply of fresh milk to meet the needs of consumers. Evidently the legislature considered the condition of the milk industry in this respect a real menace not only to those engaged therein but to the consumers who depended on milk and cream as absolute necessary articles of food. We cannot say that this condition does not now, or at least at the time of the enactment of said section did not, exist, now can we deny the power of the legislature to remedy the evil, provided it proceeded along constitutional lines. Having given the director the power to fix the minimum price of fluid milk, and having provided that in so fixing said price he shall take into consideration the additional cost of producing and marketing fluid milk over and above the costs incurred in producing and marketing manufacturing milk, the legislature has not left the fixing of the price of fluid milk to the unrestrained or arbitrary discretion of the director, but it has established a standard which he is to follow in the exercise of this power.

Section 736.3(b) providing that the minimum price of fluid milk designated by the director shall be based upon the economic relationship of fluid milk to the price of manufacturing milk by taking into consideration the difference in the cost of producing and marketing these two classes of milk is like in principle to the so-called "flexible tariff" provision of the Tariff Act of 1922 (42 Stat. 858) by which the president was authorized to change the tariff rates to equalize differences in cost of production between articles manufactured in this country and those manufactured abroad. The standards thus established were held to be sufficient and the Tariff Act was upheld as not constituting any unlawful delegation of legislative power. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. Similar holdings are to be found in the following cases: Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; Federal Radio Commission v. Nelson, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406, and Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191.

[27] It will be noted that in designating the minimum price to be paid to the producer for fluid milk under section 736.3 (b), quoted above, two further standards are prescribed for the guidance of the director. They are: (1) That the director finds that such prices will tend to effectuate the "purposes and policy of this chapter", and, (2) "Will insure consumers a sufficient quantity of pure and wholesome milk." Each of these two additional standards must be complied with by the director in fixing the minimum price to be paid to the producer, and if either is found too indefinite or uncertain to serve as a guide to the director, then the section cannot be sustained. We need spend but little time in the discussion of the first of these standards, as we have already considered and held valid a similar provision to be a sufficient standard for the director's guidance in our consideration of section 736.1, and what is said there applies with equal force to the requirement in the present section that the director must find that the prices so fixed by him will "tend to effectuate the purposes and policy of this chapter". The only difference in the phraseology of the two expressions is that in section 736.3 (b) the words, "purposes and policy of this chapter" are used, while in section 736.1, the expression is confined to the "purposes of this chapter". We do not think that the addition of the words "and policy" adds anything to the former expression, as "purposes" and "policy" in the sense used in these two sections are synonymous.

[28] Amici curiae, who question the sufficiency of these two standards concede

that the second standard which provides that the director shall find that the prices so fixed "will insure consumers a sufficient quantity of pure and wholesome milk", is "more concrete and understandable, and that if the other standard were sufficient, this at least would be understandable". Having held the other standards sufficient, under this concession of amici curiae, we would feel justified in holding the second of these standards both understandable and sufficiently certain to serve as a guide to the director in discharging his duty under that section of the act. We can see nothing uncertain or indefinite respecting a requirement that the prices fixed for the sale of milk shall be such that they "will insure consumers a sufficient quantity of pure and wholesome milk".

The respondents and amici curiae cite with considerable assurance the case of In re Peppers, 189 Cal. 682, 209 P. 896, 897, in support of their claim that this and various other sections of the Agricultural Code hereinbefore discussed confer legislative power upon the director without adequate or proper standards to direct him in the execution of the powers conferred upon him. In the Peppers case, the act under which the shipper was being prosecuted (The California Fruit and Vegetable Standardization Act [Stats.1921, p. 1234]), declared that "Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped". Section 10. This provision, the court pointed out, did not purport to forbid the shipment of all frosted oranges, but only those frosted to the extent of endangering the reputation of the citrus industry, if shipped. The court then asks the pointed question, "How is the producer whose oranges have been touched with frost to know, from the terms of this act, whether or when he will be violating it in offering his fruit for shipment?" The court then concludes that this provision of the act, "is too vague, indefinite, and uncertain * * * to furnish the basis of a criminal prosecution". It further held that other provisions of the act, if they attempted to confer upon the department of agriculture the power to make more certain the clause of said act declaring that "oranges shall be * * * unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped", were unconstitutional, as "the Legislature had no power to thus delegate to an administrative board or officer its *exclusive* power and function of determining what acts or omissions on the part of an individual are unlawful". In other words, that opinion held that the legislature had attempted to make it a criminal offense to ship oranges under certain conditions which the court held were so uncertain that it was impossible for the shipper to know "whether or when" he was violating the statute. The court held the provision of the statute void. It was then claimed that the legislature had conferred upon the director of agriculture the power to make more certain the language of the act making it a crime to ship oranges under the conditions prescribed in the statute, and in answer to this claim, the court held that it was the exclusive power and function of the legislature to determine what act of the individual was illegal, or in other words, criminal. No like questions are present in the proceeding now before us.

We are, therefore, of the opinion that there is nothing to be found in the decision of the Peppers case contrary to the conclusions heretofore expressed by us in the present proceeding. The standard there prescribed for the guidance of the shipper was obviously so uncertain and indefinite that he was unable to follow it in the shipment of his fruit. Those standards which are prescribed by the sections of the Agricultural Code to which exception has been taken, and which we have discussed, are for the guidance in every instance of the director of agriculture in the performance of the several duties enjoined upon him by the act. While it may be that in some instances the provision prescribing the standard is not free of doubt as to its precise meaning, yet that fact furnishes no legal reason for declaring the act unconstitutional. "If there is doubt, the expressed will of the legislature should be sustained." 5 Cal.Jur., p. 630. Again on the same page of this volume of California Jurisprudence, we find the following statement supported by numerous authorities, "It is the repeated declaration of the courts that they will not annul, as contrary to the Constitution, a statute passed by the legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution."

[29, 30] The practice of delegating to administrative officers or boards powers

which were originally performed directly by the legislature is of long standing and has met the approval of the highest courts in this state as well as in other jurisdictions. "The policy of the law favors the placing of detailed responsibility in administrative officers. The courts uphold statutes vesting such powers in such officers if it is possible fairly to do so, at least where the powers are merely ministerial. In order to justify the courts in declaring a statute imposing particular duties or conferring authority upon administrative officers to be inoperative as a delegation of legislative power, it must clearly appear beyond a reasonable doubt that the duty or authority so imposed or conferred is one appertaining exclusively to the legislative department and that the delegation of it is not warranted under the provisions of the Constitution." 11 Am. Jur., p. 955.

In the recent decision of this court entitled East Bay Municipal Utility District v. Department of Public Works, 1 Cal.2d 476, 35 P.2d 1027, 1028, we find the following statement of the law as announced in Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, cited with approval, "'It has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business."'"

For additional authorities supporting this statement, see cases cited in the opinion in the case of East Bay Municipal Utility District v. Board of Public Works, supra.

This statement of the law also answers the contention of the respondent and amici curiae that in a number of instances judicial power is conferred upon the director of agriculture in that he is empowered to hold hearings at which evidence is produced and findings of fact are made by him.

In the case of Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 277; 252 P. 1038, it was held the granting of power to the Fish and Game Commission to hold hearings and determine the facts incidental to the regulation of the fish and game and to the granting of permits to take and use fish, was valid as an administrative or regulatory power, and in nowise transgressed upon the exclusive functions of the judicial department. This ruling is supported by People v. Sacramento Drainage District, 155 Cal. 373, 387, 388, 103 P. 207, and Tarpey v. McClure, 190 Cal. 593, 606, 213 P. 983.

We, therefore, conclude that, with the exception of the provision in section 737.-11(b) of said chapter 10, division IV, which purports to give to the director the power to fix the amount of damages to which a complainant is entitled for the failure of a distributor to pay for fluid milk or fluid cream purchased of a producer, none of the provisions of said chapter which has been called to our attention by either the respondent or amici curiae is invalid by reason of the alleged delegation of either legislative or judicial power to the director of agriculture.

We have already considered the effect of the invalidity of this provision of section 737.11(b) upon the other provisions of said chapter, and have shown that it does not in any way render invalid the remaining valid portions of the act.

Legislation which has for its purpose the regulation and stabilization of the milk industry, even to the extent of fixing prices for which milk may be bought and sold, is not any new development in our social legislation. While it is of recent enactment in this state, it has been in force in other states for many years last past. It has been, with few exceptions, upheld by the courts of the various sections of this country, including the United States Supreme Court and the highest appellate courts of the following states: Illinois, Iowa, New York, Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Pennsylvania, Wisconsin, Massachusetts, and New Jersey. A list of the cases in these respective jurisdictions where the validity of such statutes have been upheld is to be found in the following volumes of the American Law Reports, 101 A.L.R. 64, 110 A.L.R. 644, and 119 A.L.R. 243. We deem it unnecessary, and it would prolong this opinion, already beyond reasonable length, to even enumerate, much less analyze these scores of adjudicated cases. From the reference above they may be easily consulted by anyone desiring to further pursue this subject.

Amici curiae have called to our attention the following four cases which have held milk control statutes unconstitutional: Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 49 P.2d 1140; Maryland Cooperative Milk Producers v. Miller, 170 Md. 81, 182 A. 432; Ferretti v. Jackson, 88 N.H. 296, 188 A. 474, and Griffiths et al. v. Robinson, 181 Wash. 438, 43 P.2d 977. The case of Van Winkle v. Fred Meyer, Inc., supra, has already been shown to be inapplicable, and we refused to follow it, and the case of Griffiths et al. v. Robinson, supra, in the case of Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 571, 55 P.2d 495, supra. We deem it unnecessary to attempt to differentiate the two other cases relied upon by amici curiae, for even if they were found to be applicable and to contain rulings contrary to the many other cases which we have referred to which uphold the constitutionality of the milk control statutes, they are so hopelessly in the minority that we would not feel justified in following them. It appears, therefore, that the great weight of judicial authority sustains the constitutionality of legislation of the character now before us and is in harmony with our views as hereinbefore expressed. We are, therefore, of the opinion that chapter 10, division IV of the Agricultural Code is a valid constitutional enactment except in the one particular above noted, the excepted provision, however, not affecting the main body of said act.

The judgment is reversed with directions to the trial court to sustain the general demurrer of defendant and enter judgment in his favor.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.

---

13 Cal.2d 661

## JERSEY MAID MILK PRODUCTS CO., Inc., et al. v. BROCK, Director of Agriculture (WESTERN HOLSTEIN FARMS, Inc., et al., Interveners).

L. A. 17004.

Supreme Court of California.

June 8, 1939.

**1. Parties** ⚷40(2)

The "interest" in matter in litigation to warrant intervention under statute must be in the matter in litigation in the suit as originally brought and of such direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment, and mere consequential interest is not sufficient. Code Civ.Proc. § 387.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

**2. Injunction** ⚷114(4)

Where a matter in litigation was whether Director of Agriculture should be enjoined as against plaintiff from enforcing milk stabilization statutes and any judgment rendered therein would not directly affect others than parties to suit and would have no effect on third parties, third parties had no direct "interest" but a mere consequential interest in matter in litigation and were not entitled to intervene. Code Civ.Proc. § 387.

**3. Appeal and error** ⚷1036(6)

Where parties were not permitted to intervene in suit to enjoin Director of Agriculture from enforcing milk stabilization statutes, but were granted right to file a brief as amici curiæ, such parties were not entitled to complain. St.1935, p. 922, § 735 et seq., as amended.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by the Jersey Maid Milk Products Company, Inc., a corporation, against A. A. Brock, Director of Agriculture of the state of California, to enjoin enforcement and administration of the provisions of statutes relating to the stabilization of the milk industry, wherein the Western Holstein Farms, Inc., a corporation, and others intervened. From an order granting a motion to strike interveners' complaint from the files of the action, interveners appeal.

Affirmed.

Hill, Morgan & Bledsoe, Charles P. McCarthy, Victor Ford Collins, Mark M. Cohen, Irwin M. Fulop, Edward M. Selby, and Lewis D. Collings, all of Los Angeles, for appellants.

John L. Flynn, of Los Angeles, for respondents.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent Brock, Director of Agriculture.

CURTIS, Justice.

This proceeding was instituted for the purpose of restraining the defendant, the Director of Agriculture, from enforcing as against the plaintiffs, the provisions of chapter 10, division IV, of the Agricultural Code of this state, St. 1935, p. 922, § 735 et seq., as amended, and the marketing plan for stabilization of the milk industry formulated by him pursuant thereto for the Los Angeles county area. The plaintiffs consist of producers, distributors, and consumers of milk within said area. The appellants herein to whom we shall refer hereafter as interveners, filed a petition in the superior court in and for the county of Los Angeles in which this proceeding was pending, asking that they be permitted to intervene in said proceeding. Their petition was granted, and they thereupon filed their complaint in intervention. Thereafter the plaintiffs, and later the defendant, moved the trial court to strike said complaint in intervention from the files of said action. These motions were granted, and the interveners have appealed from the order granting said motions and striking out their complaint in intervention.

The original action, as instituted by the plaintiffs, was before this court and bears the L.A.No.16986 (91 P.2d 577). The decision in said action has this day been filed. In that decision the facts of said case are fully set out and may be ascertained by a reading of said decision. It will not be necessary, therefore, to set forth said facts in any detail herein. As noted above, the action was instituted to restrain the defendant from enforcing as against plaintiffs herein chapter 10 of division IV of the Agricultural Code, and the marketing plan for the stabilization of the milk industry formulated under the terms of said chapter.

Interveners are distributors of milk within the Los Angeles county area, and like the plaintiffs in this action are interested in the validity of said chapter of the Agricultural Code, and also like the plaintiffs, they are opposed to the enforcement of the provisions of said chapter and the stabilization plan formulated thereunder. They contend, therefore, that they have such "an interest in the matter in litigation", and in the success of the plaintiffs in said action that entitles them to intervene in the action under the terms of section 387 of the Code of Civil Procedure.

The sole question for decision, therefore, is whether the interveners have any interest in the proceeding that will entitle them to intervene as parties therein.

Section 387 of the Code of Civil Procedure provides in part that, "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." We find no direct authority upon the precise question before us under facts similar to those in the present action. Section 387 of the Code of Civil Procedure has been the subject of frequent discussion in numerous decisions of the appellate courts of the state.

[1] In the case of Isaacs v. Jones, 121 Cal. 257, 261, 53 P. 793, 794, 1101, it was held, "To avail himself of the right given by this section [sec. 387, Code Civ.Proc.] the applicant must have either an interest in the matter in litigation or in the success of one of the parties to the action, or an interest against both of them. The interest here referred to must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought." In a later case by this court, we find the following statement in reference to the language of said section, "The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105.

The question again came before the court, and it was held that, "The interest in the matter in litigation, as contemplated by the Code section, must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Elliott v.

Superior Court, 168 Cal. 734, 145 P. 101. The interest must be direct, and not consequential, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought. Isaacs v. Jones, 121 Cal. 257, 53 P. 793, 1101." La Mesa Lemon Grove, etc., Irr. Dist. v. Halley, 195 Cal. 739, 741, 235 P. 999, 1000.

[2] The last-mentioned case was brought against the officers of the plaintiff to compel them to sign and attest certain bonds claimed to have been duly authorized by the plaintiff district. Certain owners of lands within the district applied for leave to file a complaint in intervention, claiming that the bonds when issued would be invalid because the indebtedness to be evidenced thereby was beyond the power of the district to assume. Their application was denied. On appeal, the order denying their application was affirmed, the court holding that, "The matter in litigation in the pending proceeding is whether or not the respondents have refused, without legal justification, to do that which the law specifically requires them to do, as duties resulting from their respective offices." Applying the definition there given to the words "The matter in litigation", to the present proceeding, it is apparent that "the matter in litigation" herein is whether or not the defendant should be enjoined as against the plaintiffs from enforcing the provisions of chapter 10 of division IV of the Agricultural Code. Any judgment rendered in said action will have no direct effect whatever upon any person other than the parties to said action. If the judgment should be in favor of the plaintiffs the defendant will be restrained from enforcing said acts against the plaintiffs but against no other person. If it should be in favor of the defendant, then the latter would be free from any legal restraint to enforce said judgment against the plaintiffs. This judgment would in no way be binding upon the interveners as long as they are not parties to said action, and they will be as free to pursue their business after the rendition of said judgment, as they were before. They, therefore, would not gain or lose by the direct operation of the judgment. The legal operation of said judgment will have no direct effect upon interveners. It is true there may be an adjudication that said act is a valid legislative enactment which might serve as a precedent upon any action instituted against interveners for the violation of the terms of said act and to that extent it might be said that the interveners have an interest in the matter in litigation, but as the judgment so rendered would have no binding effect upon the interveners, as it would upon the parties to this proceeding, and would in no way directly affect them, their interest is not a direct but a mere consequential interest in the matter in litigation.

It has further been held that the interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the intervener will either gain or lose by the direct effect of the judgment therein. Dennis v. Spencer, 51 Minn. 259, 53 N.W. 631, 38 Am.St.Rep. 499.

In the present action the matter in litigation in the suit as originally brought, as we have stated before, is whether or not the defendant should be enjoined from enforcing the terms of said chapter against the plaintiffs. Interveners do not claim to be stockholders, or the owners of any interest in the property of either or any of the plaintiffs, and, of course, they have no interest in the defendant. They have, therefore, no direct interest in the matter in litigation in this action. Having no direct interest in the matter in litigation in this action, they had no right under section 387 of the Code of Civil Procedure to intervene therein, and the trial court properly granted the motions to strike the complaint in intervention from the files of said action. Grand Rapids v. Consumers' Power Co., 216 Mich. 409, 185 N.W. 852.

[3] We might add, before closing this opinion, that in the case of La Mesa Lemon Grove, etc., Irr. Dist. v. Halley, supra, the court observed that, "If the proposed interveners desire to file a brief as amici curiæ in the pending proceeding, application to that end would no doubt receive favorable consideration." By reference to the record in the main proceeding, being L.A.No. 16986, supra (91 P.2d 577), and to the opinion rendered therein, it will be noted that the attorneys for the interveners were granted the right to file a brief as amici curiae; that such a brief was filed; and the same was given extended consideration in our opinion therein. Interveners were, therefore, given ample opportunity to be heard upon each and all of the legal issues involved "in the suit as originally brought".

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.

33 Cal.App.2d 342

### FLEMING v. FLEMING (two cases).

Civ. 12139, 12140.

District Court of Appeal, Second District, Division 2, California.

June 13, 1939.

**1. Appeal and error ⚷1011(1)**

The trial court's finding, based on conflicting evidence, when sustained by ample evidence, is binding on the reviewing court.

**2. Executors and administrators ⚷221(9)**

In actions on claims against estate, evidence sustained finding that deceased was of sound mind at time of execution of notes on which claims were based, that execution was not brought about by undue influence, and that notes were supported by consideration.

**3. Executors and administrators ⚷221(1)**

Presumptively note on which claim against estate was based was given for sufficient consideration, and presumption was sufficient to support finding that there was consideration. Code Civ.Proc. § 1963, subd. 21.

**4. Bills and notes ⚷139(3)**

The cancellation and surrender of unpaid notes constituted sufficient consideration for new note. Code Civ.Proc. § 1963, subd. 21.

**5. Bills and notes ⚷138**

The substitution in renewal note of a new party for one of the payees named in old note did not furnish basis on which administratrix of maker could avoid liability for claim based on the note, notwithstanding absence of formal assignment of the note in writing to the new payee. Code Civ. Proc. § 1963, subd. 21.

**6. Executors and administrators ⚷207**

A claim against decedent's estate based on note for advances made by claimant as an executrix to decedent as distributee of another estate was based on sufficient consideration.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Actions, consolidated for trial, by Mary A. Fleming, as surviving joint tenant, and by Mary A. Fleming, individually, against Theodora L. Fleming, as administratrix of the estate of William T. Fleming, deceased, on two claims against the estate. Judgments for plaintiff, and defendant appeals.

Affirmed.

Henry M. Lee, of Los Angeles, for appellant.

Newby & Newby, John T. Gose, and George B. Gose, all of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

Two claims were filed against the estate of William T. Fleming, who died on September 20, 1936. The claims were rejected by the administratrix and actions thereon were filed. The actions were consolidated for the purpose of trial and judgments rendered for the respective plaintiffs. The administratrix has appealed from the judgments.

In the first action it was established that decedent executed a promissory note on July 1, 1930, in the sum of $8,100 in favor of Sylvia B. Patterson and Lillian B. Patterson. The consideration for the execution of the note was money loaned by Sylvia and Lillian Patterson and Mary A. Fleming. In the year 1931 decedent paid $5,000 to the holders of the note and executed a new note in the sum of $3,100 payable to Sylvia and Lillian Patterson in joint tenancy. In April, 1933, the note for $3,100 was renewed. On April 1, 1935, decedent executed a note in favor of Lillian Patterson and Mary A. Fleming as joint tenants in the sum of $3,100, which note was given in payment and satisfaction of the prior note executed in April, 1933. Mary A. Fleming was made joint payee in place of Sylvia B. Patterson by agreement of all the parties interested. Sylvia B. Patterson has since died and her estate has been distributed to Lillian B. Patterson as sole heir. After the appeal was perfected Lillian B. Patterson died and Mary A. Fleming has been substituted as sole plaintiff.

The second action is based upon advances made by Mary A. Fleming to decedent for the education of his son, the debt being acknowledged by decedent by an instrument in writing. Mary A. Fleming and decedent were two of the heirs of Margaret Fleming, deceased, the executors of the last will of Margaret Fleming being Mary A. Fleming and Edward J. Fleming. On November 2, 1931, decedent entered into an agreement with the executors of the will of Margaret Fleming whereby he agreed that any advances made to him from the funds of the estate of Margaret Fleming should be charged against decedent and taken from his distributive share in the estate. Similar agreements were made by other heirs. By November 22, 1933, the sum of $8,645.35 had been advanced to decedent but at that time Edward J. Fleming, one of the co-executors, objected to any further advances to decedent, whereupon Mary A. Fleming authorized the reduction of the advances theretofore made to decedent from the sum of $8,645.35 to the sum of $5,824.35, by deducting the sum of $2,821 from the account of decedent and charging the sum of $2,821 to the account of Mary A. Fleming. Thereupon the sum of $2,821 was charged to Mary A. Fleming on the books of the estate of Margaret Fleming and was credited to the account of decedent. On March 22, 1935, decedent and Mary A. Fleming entered into an agreement in writing whereby decedent acknowledged an indebtedness to Mary A. Fleming in the sum of $2,821, assigned to her an interest in the estate of Margaret Fleming in the sum of $2,821, and directed the executors of the estate of Margaret Fleming to reimburse Mary A. Fleming from his part of the estate. In the distribution of the estate of Margaret Fleming the sum of $2,821 was not deducted from the share of decedent, nor was Mary A. Fleming paid in whole or in part for the advances which she had made for the account of decedent.

The same defenses were presented to both causes of action. It was alleged by the administratrix that decedent was not of sound mind at the time of the execution of the two instruments which are relied upon by plaintiffs; that the execution of the instruments was brought about by the undue influence of Mary A. Fleming; and that they were without consideration. The trial court found in favor of plaintiffs on all of these issues.

[1-6] The record discloses a marked conflict in the evidence concerning the mental capacity of decedent in the months of March and April of 1935. A number of witnesses testified that decedent was then of sound mind and a number of witnesses testified that he was not of sound mind. The finding of the trial court is sustained by ample evidence and is binding upon the reviewing court. The finding of the trial court on the subject of the alleged undue influence of Mary A. Fleming is also sustained by the evidence. Indeed there is not sufficient evidence of the exercise of undue influence to justify a finding in line with the allegations of defendant.

The finding that the claims were not without consideration must also be sustained. The original note was given for money loaned. It is presumed that the promissory note sued upon was given for a sufficient consideration. Code Civ.Proc. § 1963, subd. 21. This presumption is sufficient to support a finding that there was a consideration. Keating v. Morrisey, 6 Cal.App. 163, 91 P. 677. The cancellation and surrender of the unpaid notes constituted sufficient consideration for the new note. The criticism that Mary A. Fleming surrendered the note in which the payees named were Sylvia and Lillian Patterson and received a new note in which the payees were Lillian Patterson and Mary A. Fleming cannot aid defendant, since it was shown in evidence that the action of Mary A. Fleming in so doing was authorized by Sylvia and Lillian Patterson. A formal assignment of the note in writing was not necessary. Shoenhair v. Jones, 33 Cal.App. 545, 165 P. 971. The claim for $2,821 must also be upheld as based upon sufficient consideration. This sum was advanced to decedent at his instance and request and decedent became liable for its repayment to Mary A. Fleming. The trial court found upon sufficient evidence that Mary A. Fleming did not intend that the advances should constitute a gift. The later document acknowledged the debt and directed payment to plaintiff from the distributive share of the decedent in the estate of Margaret Fleming.

The judgments are affirmed.

I concur: McCOMB, J.

33 Cal.App.2d 303

## KRAMER v. SANGUINETTI et ux.

Civ. 6091.

District Court of Appeal, Third District, California.

June 8, 1939.

Rehearing Denied July 7, 1939.

Hearing Denied Aug. 7, 1939.

**1. Mines and minerals 🔑38(26)**

In suit to quiet title to a quartz mining claim wherein defendants asserted title to a portion of the claim by virtue of an overlapping placer claim and prayed by cross-complaint for judgment quieting their title to the placer claim, judgment quieting title to the quartz claim in plaintiff should have contained provision quieting in defendants, title to the nonoverlapping portion of the placer claim.

**2. Mines and minerals 🔑38(16)**

In suit to quiet title to a quartz mining claim, evidence supported findings and judgment that plaintiff was owner and entitled to possession of claim in question. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

**3. Mines and minerals 🔑38(24, 25)**

In suit to quiet title to a quartz mining claim, where defendants filed a counterclaim claiming title to a portion of land under an overlapping placer mining claim, findings and decree that plaintiff was owner and entitled to possession of claim described in complaint implied that defendants were not the owners or entitled to possession of any portion of their claim overlapping or conflicting with plaintiff's claim. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**4. Mines and minerals 🔑38(17)**

In suit to quiet title to a quartz mining claim, evidence supported finding that plaintiff's grantor located the claim on a certain date by discovering thereon a vein or lode of quartz, bearing gold in sufficient quantity to warrant a prudent person in spending time and money in developing the claim. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**5. Mines and minerals 🔑17(1)**

In order to locate a mineral claim, it is not necessary that gold, silver, or other mineral-bearing quartz should be discovered in sufficient quantity or value to assure the maintenance of a profitable mining enterprise. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**6. Mines and minerals 🔑17(1)**

A valid location of a mineral claim is authorized when prospector discovers a genuine vein or lode on the claim which contains sufficient gold, silver, or other valuable deposit of mineral to warrant a reasonably prudent person in expending his time and money to further develop mine with a fair prospect of realizing a profit thereby. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

**7. Mines and minerals 🔑14(1)**

A statute specifying requirements necessary for a valid location of a mining claim, as between conflicting claimants, should receive a liberal construction. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**8. Mines and minerals 🔑19(1)**

The posting of notice of location of a quartz mining claim by placing notice in a tin can deposited on a pyramid of rocks constructed in entrance to tunnel near point where quartz was discovered was sufficient as against claimant of an overlapping placer mining claim subsequently located, where such claimant had been employed to assist in locating quartz claim and was present and knew where notice was placed, notwithstanding statute requiring the posting of notice of location at point of discovery. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

**9. Mines and minerals 🔑19(1)**

Under statute requiring the posting of notice of location at the point of discovery as a preliminary to locating a mining claim, the posting of notice is ordinarily for purpose of conveying to public the information contained therein. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**10. Mines and minerals 🔑19(1)**

A notice of location containing the information specified in statute relating to posting of notice of location in connection with mining claims which is attached to and displayed on an artificially constructed pyramid of rocks at the point of discovery sufficiently complies with statutory requirement with respect to posting notice. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

**11. Mines and minerals 🔑19(1)**

The statute requiring a location notice to be given should receive a liberal construction with respect to the location thereof, as well as to its contents. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**12. Mines and minerals** ⚷19(1)

Generally, a substantial compliance in good faith with requirements of a statute or regulation in the matter of posting notice of a mining claim is required and is sufficient, particularly as against one who has actual knowledge of prior location. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

**13. Trial** ⚷397(1)

Where issues tendered by cross-complaint were necessarily included in issues presented by complaint and answer which were fully determined by trial court, it was not necessary for trial court to adopt findings on issues tendered by cross-complaint.

**14. Mines and minerals** ⚷38(27)

Where trial court in suit to quiet title to a mining claim specifically found that plaintiff was owner and entitled to possession of claim described in complaint, on appeal defendants could not complain of failure to make findings upon issues raised by cross-complaint, where such findings would have necessarily been adverse to defendants. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

**15. Appeal and error** ⚷1122(2)

Where judgment appealed from in suit to quiet title to a mining claim was proper, District Court of Appeal could adopt a further finding in order to save question of failure of trial court to adopt specific findings based on cross-complaint. Code Civ. Proc. § 956a; Const. art. 6, § 4¾.

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Suit by Charles W. Kramer against John L. Sanguinetti and Mrs. Theresa Sanguinetti, his wife, to quiet title to a quartz mining claim, wherein defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Reversed with directions.

For prior opinion, see 90 P.2d 103.

Virgil M. Airola, of San Andreas, for appellants.

Joseph H. Huberty, of San Andreas, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

[1] A rehearing of this case was granted for the sole reason that the trial court failed to render judgment quieting title in the defendants to their separate placer mine to which the plaintiff claims no title. Defendants' title to his claim was an issue in the case and should have been determined. Assuming that such a modification of the judgment should be made by the trial court, we have concluded that the cause should be remanded for that purpose. Otherwise, the opinion previously rendered properly determines the issues, and it is therefore adopted as follows:

"The defendants have appealed from a judgment quieting title in plaintiff to a quartz mining claim in Calaveras County. The defendants assert title to a portion of plaintiff's claim by virtue of an overlapping placer mining claim which they subsequently located.

"It is contended the plaintiff's title to his quartz claim is invalid for lack of evidence of a sufficient discovery of quartz on the property and for failure to post notice of his location as required by Section 1426 of the Civil Code. A reversal of the judgment is also sought on the ground that the court failed to adopt findings upon the issues tendered by the cross-complaint.

"The record discloses the following facts: Prior to the year 1928, Frederick H. Rindge located twenty-two mining claims in Mill Valley Mining District, Calaveras County, including the Buckhorn Lode Mining Claim to which title was quieted in the plaintiff in this action. Rindge forfeited his title to the claims by his failure to perform the statutory assessment work thereon from 1930 to 1935 inclusive. February 15, 1935, Harda Thelma Kramer relocated the Buckhorn Lode Mining Claim pursuant to the provisions of Section 1426 of the Civil Code by discovering thereon quartz rock in place and by posting notice of her location as required by the last-mentioned section. A few days later she conveyed the Buckhorn claim to the plaintiff, Charles W. Kramer, who thereafter performed the assessment work and became and now is the owner of said claim and entitled to the possession thereof.

"The procedure followed in the vesting of title to the Buckhorn claim in Charles W. Kramer is recited in the case of Kramer v. Gladding, McBean & Co., Cal.App., 85 P.2d 552, to which reference is made for a more particular statement of facts. It is the same as the evidence adduced in this case, in that regard. It was there determined from facts similar to those which appear in this record, that Frederick H. Rindge forfeited his title to the Buckhorn claim for failure to perform assessment work, and that Harda Thelma Kramer thereafter located that claim in the manner required by law and then transferred it to Charles W. Kramer. It was also held in that case that it was not necessary to follow in detail the procedure specified in section 1426dc of the Civil Code to perfect a valid relocation of the Buckhorn claim since it was relocated prior to the adoption of that section, September 15, 1935. Stats. 1935, p. 2260.

"John L. Sanguinetti, one of the defendants in this suit, formerly worked on the Buckhorn claim for Frederick H. Rindge. He was personally present and assisted Mrs. Kramer in locating that claim in 1935. The corners of that claim conform exactly to those which were formerly staked by Mr. Rindge. The defendants knew all about Mrs. Kramer's relocation of that claim in 1935. John Sanguinetti was employed to assist her in doing so. Her claim was duly recorded as required by law in Calaveras county, February 15, 1935. September 26, 1935, the defendant, John L. Sanguinetti, recorded a notice of location of an adjoining placer mining claim called the Chaparral Placer Mining Claim, overlapping a small portion of the Buckhorn Lode Mining Claim. The defendants took and retained possession of their placer claim and asserted their title and right to the possession thereof, together with the Buckhorn claim.

"This suit to quiet title to the Buckhorn claim was commenced by the plaintiff December 5, 1935. The complaint is couched in two counts. The first one consists of a simple action to quiet title to the claim. The second count seeks to eject the defendants from wrongful possession of a portion of the Buckhorn claim. The defendants answered the complaint, denying the essential allegations thereof, and affirmatively asserting they are in lawful possession and entitled to that portion of the claim which conflicts with their own property. There is attached to the answer a cross-complaint in which it is alleged the defendants are the owners and entitled to the possession of the Chaparral Placer Mining Claim, particularly described therein, which overlaps a small portion of the Buckhorn claim. It is also alleged the plaintiff asserts some interest in the Chaparral claim. The prayer then asks for a determination that plaintiff has no right, title or interest in or to the Chaparral claim, and that he take nothing by his action.

"The court adopted findings to the effect that all of the allegations of plaintiff's first and second causes of action are true; that plaintiff is the owner and entitled to the possession of the Buckhorn Lode Mining Claim described in the complaint, and that the defendants had no right, title or interest therein. Judgment was rendered accordingly.

"It is true the court failed to adopt specific findings upon the defendants' affirmative allegations contained in their cross-complaint with respect to their alleged ownership and right of possession of the Chaparral Placer Mining Claim.

[2, 3] "There is adequate evidence to support the findings and judgment that plaintiff is the owner and entitled to the possession of the Buckhorn Lode Mining Claim described in the complaint. Those findings and the decree necessarily imply that defendants are not the owners or entitled to the possession of any portion of their Chaparral claim which overlaps or conflicts with the description of the Buckhorn claim. Any further findings in that regard upon the issues presented by the cross-complaint would necessarily be adverse to the defendants.

[4] "The evidence sufficiently supports the finding that Harda Thelma Kramer located the Buckhorn claim in February, 1935, by discovering thereon a 'vein or lode of quartz', bearing gold in sufficient quantity to warrant a prudent person in spending time and money in developing the claim. Sec. 1426, Civ.Code; Kramer v. Gladding, McBean & Co., supra; 17 Cal. Jur. 354, sec. 48. Mr. Wyllie, a graduate mining and civil engineer, who assisted her in locating the claim, testified in that regard:

"'Q. Are those the original corners that you established in 1929? A. Yes.

"'Q. What did you find at the point of discovery? A. It is just on the upper side of the road, there is about a ten foot tunnel running into the hill, and there is a showing of quartz vein in this tunnel.

"'Q. Describe the quartz vein that you saw. A. There is a quartz vein in there that apparently has been tipped over. I can't say as to its dip, but there is a vein there approximately a foot wide, in this tunnel, of quartz and some vein material. * * * I would say that a man would be justified in looking further into the Buckhorn to see whether it wouldn't develop into a paying mine or not.'

"Adam Kramer, husband of Harda Kramer, who is a practical miner with ten or twelve years of experience, testified regarding the presence of gold-bearing quartz on that claim at the time of the location, as follows:

"'We went up to the Buckhorn (February 13, 1935). * * * Up there is a quartz ledge which has been dug back on the side of the bank. * * * We located the mine (there). * * * At the point of discovery on the Buckhorn there is a quartz vein which lies on about a fifteen per cent of a grade, about a foot thick in places and in some places not quite so thick, and right at the lower end in the tunnel, it dips, there is over a foot there with a solid ledge.

"'Q. Have you had any assay made of that vein exposed at the point of discovery? A. I did. * * *

"'Q. Do you know whether or not the quartz vein at the point of discovery is gold bearing? A. It is. * * * I think that a paying mine could be developed there.'

"Mr. Coulter, the Calaveras county surveyor, also testified in that regard:

"'I never examined the Buckhorn very closely until last Wednesday. * * * I found a quartz ledge on the Buckhorn * * * in a tunnel about five or six hundred feet from the south end of the line. * * * It is a quartz vein about ten inches or a foot thick.'

"Mrs. Kramer testified that the defendant, John Sanguinetti, was with them on February 13th, when they made the discovery and located the Buckhorn claim. At that time a written notice of location of the claim, signed by her, was enclosed in a tobacco can and placed on a small pyramid of rocks which they constructed near the entrance to the tunnel where the gold-bearing quartz was found. A copy of that notice was duly recorded as required by law.

[5, 6] "It is not necessary that gold, silver or other mineral-bearing quartz shall be discovered in sufficient quantity or value to assure the maintenance of a profitable mining enterprise. A valid location is authorized when the prospector discovers a genuine vein or lode on the claim which contains sufficient 'gold, silver, cinnabar, lead, tin, copper or other valuable deposit' of mineral to warrant a reasonably prudent person in expending his time and money to further develop the mine with a fair prospect of realizing a profit thereby. Kramer v. Gladding, McBean & Co., supra; Stinchfield v. Gillis, 96 Cal. 33, 37, 30 P. 839; Jupiter Mining Co. v. Bodie Cons. Min. Co., C.C., 11 F. 666, 675; Book v. Justice Min. Co., C.C., 58 F. 106; Stockton v. Santa Paula Oil Co., 64 Cal.App. 384, 221 P. 661; 2 Lindley on Mines, [3d ed.], p. 774, sec. 403; 17 Cal.Jur., p. 318, sec. 26; 18 R.C.L., p. 1121, sec. 32.

[7] "A statute specifying the requirements necessary for a valid location of a mining claim, as between conflicting claimants, should receive a liberal construction. Nevada Sierra Oil Co. v. Home Oil Co., C. C., 98 F. 673, 677.

[8] "Under the circumstances of this case, the defendants may not complain of an insufficient posting of the notice of location, by placing it in a tin can which was deposited on a pyramid of rocks constructed in the entrance to the tunnel near the point where the gold-bearing quartz was discovered. The defendant, John Sanguinetti, was employed to assist Harda Thelma Kramer to locate the mine. He had worked for the former owner of the mine and knew its exact location and what work had been performed in developing the mine. He was present and knew all about the discovery of the gold-bearing quartz in the tunnel, and that the notice was placed in the tin box and deposited on the pyramid of rocks as a formal notice of location of that particular claim. He may therefore not complain that the notice was not actually posted in a conspicuous place within clear view at the point of discovery. In the case of Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 22 Am.St.Rep. 283, it was held that a notice of location of a mine written on a sheet of paper which was folded and placed on a mound of rocks three feet in height constructed on the lode line and nearly concealed by another rock which covered the notice was a sufficient

compliance with the law which required it to be posted 'in a conspicuous place upon the claim located at or near the lode line of said claim'. In the case of Gird v. California Oil Co., C.C., 60 F. 531, 543, it was held that the depositing of a notice of location of a mine in a tin box which was placed on a mound of rocks near the point of discovery, under circumstances almost exactly like those in the present case, constituted a sufficient compliance with the law. In 1 Lindley on Mines, second edition, page 642, section 356, it is said:

"'An artificial mound of rocks on the line of a lode is a conspicuous object which would naturally attract the attention of one seeking information as to a former location of a lode, and the slightest examination of the mound would result in the discovery of a written notice.'

[9-12] "It is true that section 1426 of the Civil Code requires as one of the necessary preliminaries to locating a mining claim the '*posting* [of] a notice of such location, at the point of discovery'. The posting of notice is ordinarily for the purpose of conveying to the public the information contained therein. It has been said the term 'posting a notice' means that the written information shall be placed 'upon a wall, or post, or bulletin board, *or some other convenient object*' so that its contents may be displayed to the public. Iowa Missouri Grain Co. v. Powers, 198 Iowa 208, 196 N.W. 979, 33 A.L.R. 1268. We are of the opinion a notice of location containing the information specified in section 1426 of the Civil Code, which is attached to and displayed on an artificially constructed pyramid of rocks at the point of discovery sufficiently complies with the requirement with respect to posting the notice. The statute requiring a location notice to be given should receive a liberal construction with respect to the location thereof as well as to its contents. Stock v. Plunkett, 181 Cal. 193, 197, 183 P. 657; Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 22 Am.St.Rep. 283; Allen v. Laudahn, Idaho, 81 P.2d 734, 739; Yosemite Gold Min. Co. v. Emerson, 208 U.S. 25, 28 S.Ct. 196, 52 L.Ed. 374. In 40 Corpus Juris, page 795, section 199, it is said: 'As a general rule a substantial compliance in good faith with the requirements of the statute or regulation in the matter of posting notice is required and is sufficient, *particularly as against one who has actual knowledge of the prior location.*'

"It is not necessary to determine in this case whether such a notice of location enclosed in a tin can and thereby concealed from view, even though the can be placed on an artificially constructed pile of rocks at the point of discovery, would be a sufficient compliance with the law, for the reason that the defendants had personal knowledge of the prior location of Mrs. Kramer, and the actual placing of the notice thereof in the tin can. John Sanguinetti actually assisted her in locating the claim. He was personally present when the notice was placed in the can and deposited on the pyramid of rocks. If he did not know exactly what the notice contained, he knew where to find it and how to further inform himself regarding its contents. The manner of posting the notice was therefore adequate as between the locator of the Buckhorn claim and the defendants.

[13] "It was not necessary for the court to adopt findings on the issues tendered by the cross-complaint for the reason that they were necessarily included in the issues presented by the complaint and the answer which were fully determined by the court. Sormano v. Wood, 179 Cal. 102, 175 P. 451; Brooks v. White, 22 Cal.App. 719, 136 P. 500; 22 Cal.Jur. 162, sec. 37. The complaint alleges that the plaintiff is the owner and entitled to the possession of a specifically described quartz mining claim. The answer denies those allegations and affirmatively asserts that the defendants are entitled to the possession of that property. The cross-complaint reiterates the affirmative allegations of the answer in that regard. It describes twenty acres of land which it is alleged belongs to the defendants. The defendants claimed that a portion of the land described in their cross-complaint overlaps a part of the mining claim to which the plaintiff asserts title. The real issue was whether plaintiff or defendants own that portion of the mining claim described in the complaint which is overlapped by a part of the defendant's property which is described in the cross-complaint. The court specifically found all of the allegations of the complaint to be true. The court further found that the plaintiff is the owner and entitled to possession of all of the mining claim which is described in the complaint, and that defendants had no right, title or interest in any portion of the property described in the complaint. A judgment was

rendered accordingly. This disposes of every essential issue in the suit to quiet title to that particular mining claim. No other property was necessarily involved therein. The plaintiff claims no title to any portion of defendants' land beyond the specifically described boundaries of his own mining claim. The judgment of the court merely quiets title in plaintiff to the mining claim described in the complaint.

[14] "Since the court specifically found that the plaintiff is the owner and entitled to possession of the entire mining claim described in the complaint, it is evident that further findings upon the issues raised by the cross-complaint would necessarily be adverse to the defendants. A multitude of authorities have determined that an appellant is not prejudiced by a failure to find upon issues which, in support of the judgment, would necessarily be adverse to him. Phillips v. Stark, 65 Cal.App. 136, 223 P. 443; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737; 24 Cal.Jur. 944, sec. 188; 10 Cal.Jur., 10 Year Supp., p. 741.

[15] "However, to save the question of the failure of the court to adopt specific findings based on the cross-complaint regarding the affirmative allegations of defendants' asserted title and right of possession to their Chaparral Placer Mining Claim as against the plaintiff, this court hereby adopts the further finding under the authorities of article VI, section 4¾ of the California Constitution, section 956a of the Code of Civil Procedure, and Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970, that: 'Defendants are the owners and entitled to the possession of all that portion of their Chaparral Placer Mining Claim in Calaveras County, California, described in the cross-complaint which does not overlap or conflict with the description of plaintiff's Buckhorn Lode Mining Claim, as it is described in the complaint.'"

The judgment is reversed and the court is directed to render judgment in accordance with the foregoing opinion, quieting title in plaintiff to his Buckhorn Lode Mining Claim described in the complaint, and further quieting title in defendants to all of that portion of their Chaparral Placer Mining Claim described in the cross-complaint which does not overlap or conflict with plaintiff's claim. The plaintiff may recover his costs on appeal.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 358

## In re HUNT'S ESTATE.

## HALL et al. v. SAMPSON et al.

Civ. 12177.

District Court of Appeal, Second District, Division 2, California.

June 14, 1939.

**1. Wills** ⟹319

In proceedings to revoke admission of will to probate on ground of undue influence, contestants' contention that case was not properly at issue when set for trial by trial court because only one respondent had filed an appearance when case was set could not be sustained where prior to date of trial all respondents had filed answer to contest except certain ones who were neither beneficiaries under will nor heirs of decedent.

**2. Wills** ⟹263

In proceedings to revoke admission of will to probate on ground of undue influence, persons who were neither beneficiaries under will nor heirs of decedent were not "necessary parties."

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

**3. Wills** ⟹360

In absence of motion for continuance at time a case is called for trial, a party will not be permitted on appeal to urge that he did not have sufficient time to prepare for trial.

**4. Appeal and error** ⟹205

Where a question to which an objection is sustained does not itself indicate that answer to it will be favorable to party seeking to introduce testimony, before ruling will be reviewed, an offer of what is proposed to be proven must first be made to trial court, so that reviewing court can determine whether proposed evidence would have been material and beneficial to party offering it.

**5. Wills** ⟹360

In proceedings to revoke admission of will to probate on ground of undue influence, Court of Appeal would not consider contestants' contention that trial court committed prejudicial error in sustaining objections to certain evidence offered by contestants where questions to which objections were sustained did not indicate that answers would be material or beneficial to contestants and no offer of proof was made.

**6. Trial** ⚿244(3)

In proceedings to revoke admission of will to probate on ground of undue influence, contestants' contention that trial court committed prejudicial error in giving instructions and in singling out certain portions of evidence and stating to jury that such individual points did not constitute undue influence and that by repetition of instructions trial court unduly emphasized certain contentions of respondents could not be sustained.

**7. Appeal and error** ⚿758(3)

Error predicated on refusal of trial court to give requested instructions will not be reviewed in absence of argument indicating wherein refusal to give instructions was erroneous and prejudicial to complaining party.

**8. New trial** ⚿150(4)

Before a motion for new trial will be granted on ground of newly discovered evidence, the moving party must show to satisfaction of trial court that he had exercised reasonable diligence in an endeavor to discover and produce such evidence prior to original trial.

**9. Wills** ⚿337

In proceedings to revoke admission of will to probate on ground of undue influence, contestants' motion for new trial on ground of newly discovered evidence was properly refused where witness, who contestants claimed would give evidence favorable to them upon another trial, testified in the first trial and there was no showing that alleged new testimony would not have been given at former trial if witness had been properly interrogated or that counsel could not have interviewed witness prior to trial.

---

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding in the matter of the estate of Laura Shellabarger Hunt, also known as Laura S. Hunt, deceased, by Isaac S. Hall and Mildred S. Cairns, and Mildred S. Cairns, as administratrix of the estate of Carl Cairns, deceased, contestants, against Richard Hunt Sampson and Richard Hunt Sampson, as executor of the last will and testament of the estate of Laura Shellabarger Hunt, also known as Laura S. Hunt, deceased, and others to revoke the admission of a will to probate on the ground of undue influence. From a judgment for defendants, contestants appeal.

Affirmed.

James W. Bell, of Los Angeles, for appellants.

Latham, Watkins & Bouchard and Lasher B. Gallagher, all of Los Angeles, Eugene J. Wix, of Glendale, and C. F. Holland, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of respondents after trial before a jury in an action to revoke the admission of a will to probate on the ground of undue influence, contestants appeal.

The essential facts are:

February 17, 1935, decedent Laura S. Hunt executed her last will and testament. Thereafter she died and on December 22, 1936, her will was admitted to probate. June 21, 1937, contestants filed a petition to have the probate of the will revoked. October 1, 1937, an order was made by which the present counsel for contestants were substituted as counsel of record in place and stead of the attorneys who had previously represented contestants.

October 22, 1937, a motion was made by respondents to dismiss the petition contesting the admission of the will to probate or to set the matter for trial forthwith. In ruling upon the motion the superior court set the matter for trial on November 29, 1937, on which date the trial commenced, the contest being based solely on the ground that decedent's will was procured by the undue influence of respondents.

Contestants rely for reversal of the judgment on these propositions:

*First: The case was not properly at issue when the trial court set it for trial, because only one of the respondents had filed an appearance when the setting was made.*

*Second: The trial court did not afford contestants sufficient time to prepare for trial.*

*Third: The trial court committed prejudicial error in sustaining objections to certain evidence offered by contestants.*

*Fourth: The trial court committed prejudicial error in (a) giving instructions to* *the jury, and (b) refusing to give certain instructions requested by contestants.*

*Fifth: The trial court committed prejudicial error in refusing to grant contestants' motion for a new trial on the ground of newly discovered evidence.*

[1, 2] Contestants' first proposition is without merit. Prior to the date of trial all respondents had filed an answer to the contest with the exception of Emil A. Bruder and Warren A. Pike, neither of whom were beneficiaries under the will or heirs of decedent. They were mere strangers to the proceedings and as such not necessary parties. San Diego Trust etc. Bank v. Heustis, 121 Cal.App. 675, 681, 10 P.2d 158.

[3] The second proposition is likewise without merit. The law is established in California that in the absence, as in the instant case, of a motion for a continuance at the time a case is called for trial, a party will not be permitted on appeal to urge that he did not have sufficient time to prepare for trial. Denvir v. Judson Frt. Forwarding Co., 86 Cal.App. 369, 372, 260 P. 846. In the present case on November 29, 1937, when the case was called for trial, contestants' counsel announced, "We are ready for the plaintiffs, if the court please."

[4, 5] We will not consider the problems presented relative to contestants' third proposition, for the reason that it is the established law of California that, where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the tesimony, before the ruling will be reviewed by an appellate court, an offer of what is proposed to be proven must first be made to the trial court, so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. Guyer v. Pacific Electric Railway Co., 24 Cal.App.2d 499, 503, 75 P.2d 550. In the present case the questions to which objections were sustained did not indicate that the answers would be either material or beneficial to contestants nor was any offer of proof made.

[6] There is no merit in the contention made in paragraph (a) of contestants' fourth proposition. Contestants urge that the trial court erred in singling out certain portions of the evidence and stating to the jury that such individual points did not constitute undue influence and that the trial court by repetition of instructions unduly emphasized certain contentions of respondents. A reading of the instructions given by the court shows that the claimed error is without merit and that the jury was fully, fairly, and completely instructed relative to the issues to be determined by it.

[7] The error urged by contestants in paragraph (b) of their fourth proposition will not be considered by us, for the rule is established in California that error predicated on the refusal of the trial court to give requested instructions will not be reviewed on appeal in the absence of argument by counsel indicating wherein the refusal to give the instructions was erroneous and prejudicial to the complaining party. Truman v. Sutter-Butt Canal Co., 76 Cal.App. 293, 309, 244 P. 923. In the instant case counsel for contestants have failed to furnish us any argument or authorities supporting the proposition that it was error for the trial court to refuse to give some of the instructions requested by contestants.

[8, 9] The final proposition is devoid of merit. Contestants claim that on a new trial Warren A. Pike would give testimony favorable to their contentions, which evidence could not with reasonable diligence have been produced on the former trial. The law is established in California that, before a motion for a new trial will be granted on the ground of newly discovered evidence, the moving party must show to the satisfaction of the court that he had exercised reasonable diligence in an endeavor to discover and produce such evidence prior to the original trial. In the present case contestants have failed to meet the requirements of this rule. Warren A. Pike, the witness who contestants claim will give evidence favorable to them upon another trial, was present and testified in the present trial, and there is an utter absence of showing that the testimony which it is claimed he will give would not have been given by him had he been properly interrogated by contestants' counsel when he was a witness at the trial, nor is there any showing that contestants' counsel could not have interviewed Mr. Pike prior to the time he became a witness at the trial, and thus acquainted them-

selves with the testimony they say he would now give upon another trial.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: WOOD, Acting P. J.

33 Cal.App.2d 356

**In re HUNT'S ESTATE.**

**HALL et al. v. BOUCHARD et al.**
**SAME v. GALLAGHER.**
**Civ. 12176, 12178.**

District Court of Appeal, Second District, Division 2, California.

June 14, 1939.

**1. Executors and administrators** 🔑**216(2)**

Probate court was authorized to allow attorneys' fees to attorneys for executor subsequent to their having rendered extraordinary services, which resulted in a judgment refusing to set aside probate of decedent's will upon ground that it had been procured through undue influence, where more than six months elapsed between date of admission of will to probate and date of orders allowing fees and due notice had been served upon all interested parties. Probate Code, § 911.

**2. Executors and administrators** 🔑**216(2)**

The provision of Probate Code authorizing probate judge to order an executor to pay his attorneys out of the estate on account of extraordinary services rendered authorizes allowance of fees by probate court for either ordinary or extraordinary services. Probate Code, § 911.

Appeal from Superior Court, Los Angeles County; Florence F. Bischoff, Justice pro tem.

Proceedings in the matter of the estate of Laura Shellabarger Hunt, also known as Laura S. Hunt, deceased, by Isaac S. Hall and another, contestants, against George Bouchard and others, doing business under the firm name of Latham, Watkins & Bouchard. From orders allowing fees to defendants as attorneys for the executor of the estate of Laura S. Hunt, deceased, contestants appeal.

Orders affirmed.

James W. Bell, of Los Angeles, for appellants.

A. R. Kimbrough, of Los Angeles, for respondents.

Lasher B. Gallagher, of Los Angeles, in pro. per.

McCOMB, Justice.

These appeals consolidated for the purpose of hearing before this court are from orders allowing (a) $3,700 to Bouchard, Latham & Watkins, and (b) $7,500 to Lasher B. Gallagher, attorneys for the executor of the estate of Laura S. Hunt, deceased. The fees were for extraordinary services rendered in defending a petition to revoke the probate of decedent's will on the ground of undue influence.

[1] This is the sole question to be determined:

*Did the trial court have authority to allow attorneys' fees to the attorneys for the executor subsequent to their having rendered extraordinary services, which resulted in a judgment refusing to set aside the probate of decedent's will upon the ground that the same had been procured through undue influence?*

This question must be answered in the affirmative. At any time after six months from the issuance of letters testamentary, upon notice to the interested parties, the judge of the probate court may order an executor to pay his attorneys out of the estate on account of extraordinary services rendered up to that time such compensation as the judge shall deem proper. (Sec. 911, Prob. Code.)

[2] It is our opinion that section 911 of the Probate Code authorizes the allowance of fees by the probate court either for ordinary or extraordinary services, and does not confine the probate court's jurisdiction to the allowance of ordinary fees.

December 22, 1936, the will of decedent was admitted to probate and Richard Hunt Sampson appointed executor of the estate, January 13, 1937. March 11, 1938, and May 3, 1938, the orders here questioned were made by the probate judge. Therefore, it is evident that more than six months having elapsed since the date of admission of decedent's will to probate, and due notice having been served upon all interested parties, the court was vested with jurisdiction to make the orders here involved.

For the foregoing reasons, the orders are and each is affirmed.

I concur: WOOD, Acting P. J.

---

33 Cal.App.2d 279

**McMILLAN PROCESS CO. v. BROWN et al.**

**Civ. 6112.**

District Court of Appeal, Third District, California.

June 8, 1939.

**1. Corporations 🔑642(6)**

In foreign corporation's action to recover possession or value of machinery which was in defendants' possession under conditional sales contract, evidence of two isolated intrastate transactions of corporation within state of California did not sustain burden on defendants of establishing by preponderance of evidence defendants' contention that corporation was not entitled to maintain action because it was "transacting intrastate business" in California without complying with law relating to foreign corporations transacting business in California. Civ.Code, § 405.

[Ed. Note.—For other definitions of "Transacting Business," see Words & Phrases.]

**2. Corporations 🔑642(1)**

Generally, a foreign corporation must transact a substantial part of its business within the state to justify a finding that the business transacted constitutes "transacting intrastate business" within statute relating to transaction of such business by foreign corporation within state of California. Civ.Code, § 405.

**3. Limitation of actions 🔑197(1)**

Evidence sustained finding that action by corporation to recover possession or value of machinery which was in defendants' possession under conditional sales contract was not barred by three-year statute of limitations, on ground that corporation which filed complaint on September 28, 1934, had no notice that defendants claimed ownership of the machinery and was not proceeding under original conditional sales contract until the year 1934. Code Civ.Proc. § 338.

**4. Sales 🔑479(7)**

In corporation's action to recover possession or value of machinery which was in defendants' possession under conditional sales contract, evidence sustained finding that there was no cancellation of the contract by defendants and that contract remained in effect until date of corporation's election to treat contract as canceled because of defendants' breach of contract.

**5. Patents 🔑215**

Corporation which granted defendants right to use patented machine under conditional sales contract had no duty to declare forfeiture because of failure of defendants to pay certain royalties due under the contract, and corporation could continue to rely upon the contract, which corporation subsequently elected to treat as canceled because defendants claimed ownership of the machine and refused to otherwise comply with terms of the contract.

**6. Sales 🔑479(5)**

In corporation's action to recover possession or value of machinery which was in defendants' possession under conditional sales contract, sufficiency of corporation's notice of forfeiture of the contract could not be questioned by defendants, where evidence indicated that defendants claimed complete ownership of the machinery and denied any right in corporation, since, under such circumstances, notice and demand would have been unavailing.

**7. Sales 🔑479(7)**

In corporation's action to recover possession or value of machinery which was in defendants' possession under conditional sales contract, evidence sustained determination that corporation was sole owner of the machinery and was entitled to its possession, and that value of machinery was $2,500.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by the McMillan Process Company against C. H. Brown and others for recovery of possession of certain patented machine sold under conditional sales contract. From an adverse judgment, defendants appeal.

Affirmed.

Frank Thompson and H. C. Nelson, both of Eureka, for appellants.

Irwin T. Quinn, of Eureka, for respondent.

MONCUR, Justice pro tem., delivered the opinion of the court.

Plaintiff in the above-entitled action, the respondent herein, and C. H. Brown, one of the above-named defendants and appellants, entered into a conditional sales contract on the 24th day of August, 1924, by which the respondent gave and granted to said C. H. Brown the right to possess, use, and operate a certain patented machine intended for the purpose of defiberizing wood. The contract also provided for the delivery to said C. H. Brown of additional machines when and if required, and pursuant thereto an additional machine was delivered to said C. H. Brown. Said contract provided that said C. H. Brown would not at any time sell, assign, transfer, pledge, or otherwise incumber any of said machines and that title to said machines should at all times remain in respondent, subject to the right of said C. H. Brown to possess, use, and operate said machines as specified in the contract; that respondent or its nominees should at all times have access to the books, records, shipping documents, memoranda, and other data kept or used by second party in conducting his business for the purpose of checking and determining the amount of redwood bark, lumber, wood, sawmill waste and forest waste defiberized, manufactured, produced and sold by second party in which said machines or any of them were in anywise used. Also, if said C. H. Brown should make default in any of the terms, covenants and conditions to be kept and performed by him, he should forfeit all right to possess, use, or operate all of said machines specified therein to be manufactured and leased thereunder or thereafter, and that respondent might, at its option, be entitled to repossess said machines, and in such event all rights of C. H. Brown in and to said machines should terminate and cease.

As consideration for the delivery of said machines to said C. H. Brown he agreed to pay to respondent for the right to possess, use and operate said machines and each of them, a royalty of $1 per ton upon all redwood bark sold and shipped and 50 cents per ton upon all lumber, wood, sawmill waste and forest waste sold and shipped defiberized wholly or partially by said machines, and beginning with one year from the date of said contract to pay to respondent an additional sum of 50 cents per ton on all redwood bark, lumber, wood, sawmill waste and forest waste defiberized by said machines until said additional sum of 50 cents so paid should equal the sum of $5,500 for each of said machines. Also, a down payment of $2,000 on each machine delivered was specified. The royalties as provided in said contract were to be paid on the 10th day of every month covering all transactions of the previous calendar month.

Under this contract the machines were delivered and used by appellants Brown and some royalties were paid. Disputes arose concerning the payment of royalties and on January 23, 1931, an amendment to the contract was agreed upon, whereby it was provided that all future royalties should be 50 cents per ton upon all bark defiberized under said contract, and that payment of $800 should be made upon the execution of the amended agreement and a balance of $973.72 should be paid within sixty days thereafter. The amounts provided in said amendment were paid until June 10, 1931, when no further payments were made under the original or amended contracts. Appellants, however, continued to use the said machines.

In August or September of 1934 appellants informed respondent that they owned the machines and that respondent had no right to them or the royalties due under the contract and refused them the right to see the machines. Also, on or about that time, appellant Barry Brown, a son of appellant C. H. Brown, refused to allow U. S. McMillan, then president of respondent corporation, to see the books and records of said C. H. Brown or of the alleged partnership.

On September 19, 1934, respondent notified said C. H. Brown in writing that it elected to terminate the contract for his failure to comply with the terms, covenants and conditions in said contract to be performed by him and by reason of his default therein surrender of the machines was demanded, and he was notified that if he did not surrender possession of the machines to respondent forthwith action would be instituted therefor and that the said contract would be declared at an end.

The complaint in the action was filed on the 28th day of September, 1934, and asked for a recovery of the possession of the said machines and, in the event that recovery cannot be had, for the value thereof.

Respondent corporation was organized under the laws of the state of Nevada in 1922. Its principal place of business was located in San Francisco until 1927, when its principal place of business was moved to Chicago. Until 1927 said respondent corporation was authorized to do intrastate business in California but thereafter it was not so authorized. In the years from 1932 to 1936 the corporation's rights under the laws of Nevada were suspended because of its failure to comply with certain requirements of the Nevada statutes but on the 13th day of April, 1936, the suspension was removed and it was reinstated.

In their answer appellants set forth the following defenses: (1) That respondent was not entitled to maintain the action because of its failure to comply with the laws of the state of Nevada and of the state of California; (2) that respondent's cause of action is barred by the statute of limitations; (3) that under the facts appearing in evidence respondent was not entitled to declare a forfeiture and to repossess the said defiberizing machines.

Regarding the question of the corporation's suspension in the state of Nevada, as the suspension had been removed prior to the trial of the action this defense need not be considered. In connection with appellants' contention that respondent transacted intrastate business in California, the evidence shows two isolated transactions, one after the action was commenced and prior to any hearing on the merits, and one after a partial trial of the case. There is some conflict in the evidence as to whether these two transactions were carried on personally as an individual by said U. S. McMillan, who was then president of respondent corporation, or were for and on behalf of the corporation.

[1] If it be assumed that the two transactions were on behalf of the corporation, still it cannot be held that such transactions constituted doing intrastate business in this state. As stated, respondent corporation did no intrastate business in California from 1927 until the dates of the two alleged intrastate transactions claimed to have occurred in 1936. Section 405 of the Civil Code of this state provides as follows:

> "The term 'transact intrastate business' as used in this chapter means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

In 6a California Jurisprudence, page 1594, is found the following:

> "The general consensus of opinion is that a corporation must, to come within the provisions, transact within the state some substantial part of its ordinary business by its officers or agents selected for that purpose, and that the transaction of an isolated business act is not carrying on or doing business. If the corporation is engaged in a more or less continuous effort, not merely casual, sporadic or isolated, to conduct and carry on within the state some part of the business in which it is actually and generally engaged, it may be said to be doing business within the state."

[2] Further citation of authorities upon this point is deemed unnecessary. It will suffice to say that it is generally held that a foreign corporation must transact a substantial part of its business within the state to justify a finding that the business transacted constitutes doing intrastate business. Even the authorities cited by appellants appear to be in agreement upon this point. The burden was upon appellants to establish their contention in this regard by a preponderance of the evidence. This they did not do. The trial court found against their contention. This finding is supported by the evidence and is in conformance with the settled rule of law in this state. We are satisfied that the trial court's finding is correct and that it should not be disturbed by this court.

[3] Appellants earnestly contend that there was a cancellation of the original contract entered into in 1924 between respondent and appellant C. H. Brown, that notice of such cancellation was brought home to respondent and that therefore the action is barred because of not having been commenced within three years from notice of such cancellation. Code Civ. Proc. § 338. Much evidence concerning this question was presented to the trial court, consisting of oral testimony and correspondence. The court found against appellants' contention upon this defense. Viewing all of the evidence upon this question in connection with the conduct of

the respective parties and particularly that of the appellants, nothing is shown sufficient to impart such notice to respondent as to indicate to respondent that appellants were no longer proceeding under the original contract and the amendment thereto until 1934. Notice of respondent's election to treat the contract as canceled and demanding the return of the two defiberizing machines was given to appellants promptly following appellants' claim of ownership of the said two machines and their refusal to otherwise comply with the terms of the contract and this action having been promptly commenced thereafter, the defense of the statute of limitations could not lie.

[4, 5] Appellants' claim to ownership of the machines is based upon an alleged transaction with one G. A. Aicher, who was president of the respondent corporation when respondent corporation and appellant C. H. Brown entered into the contract of August, 1924. It appears that the machines as delivered to appellant C. H. Brown did not operate satisfactorily and that it was necessary for Mr. Aicher to go to the place where the machines were being operated for the purpose of endeavoring to make the machines operate properly. Changes were made in the machines, and after negotiations between C. H. Brown and Mr. Aicher, it was testified to by defendant C. H. Brown that he and Mr. Aicher agreed that the contract of August 14, 1924, should be definitely canceled and that a new contract was then made between them whereby the ownership of the machines was relinquished to said C. H. Brown. From the evidence in the case, it appeared that Mr. Aicher had passed away several years prior to the trial of the action. Therefore the court did not have the benefit of his testimony in respect to this matter. Considerable evidence, consisting of letters claimed to support this testimony of C. H. Brown, was introduced. To set forth this evidence at length would entail an unnecessary extending of this opinion. At this time it is sufficient to say, viewing the conduct of the parties in respect to this claim of appellants, that, as shown by the evidence, the trial court was amply justified in finding, as it did, that there was no cancellation of said contract by appellants and that it remained in full force and effect until the date of election of respondent to treat the original and amended contracts as being canceled. It is neither claimed nor shown by appellant that there was any authorization by the respondent corporation to Mr. Aicher to modify or cancel the original contract between respondent and C. H. Brown and no ratification by respondent corporation of the alleged action of Mr. Aicher is either claimed or shown; neither is it of any avail to appellants that respondent corporation did not declare a forfeiture when there was a cessation in payments of the royalties.

"The plaintiff was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election still to rely upon it. The statute could not begin to run until he made his election to rely no longer upon the contract. * * *" Richter v. Union Land & Stock Co., 129 Cal. 367, at page 375, 62 P. 39, 41; Rose v. Foord, 96 Cal. 152, 30 P. 1114; Taback v. Greenberg, 108 Cal.App. 759, 760, 292 P. 279.

[6] As to the sufficiency of any notice of forfeiture given to appellants, as they claimed complete ownership of the machines anyway and denied any rights in respondents, any further or additional notice was unnecessary. Clearly, under the circumstances here disclosed, notice and demand would have been unavailing, and any further proof of such notice and demand is not necessary. Wood v. McDonald, 66 Cal. 546, 6 P. 452; San Diego Construction Co. v. Mannix, 175 Cal. 548, 558, 166 P. 325.

[7] As has been stated, the contract provided for an initial down payment of $2,000 upon the purchase price of $5,500 for each machine, the balance to be paid as royalties at 50 cents per ton for the defiberized product of said machines. The down payment of $2,000 for each of said machines was not made, neither were any payments of royalties of 50 cents per ton to be applied on the purchase price of said machines made. There were payments amounting to $5,140.09 made to be applied on the royalties for the use of the patent processes as provided in the contract. If appellants' contention that they became the owners of the machines and entitled to possess them as against the respondent can be sustained, it must be upon such proof as to satisfactorily show that it was the intention of respondent corporation that ownership in the machines should be vested in appellants without making any payments therefor. The evidence falls far short of such proof. The court found the value

of the machines to be $2,500. The determination of the trial court that respondent was the sole owner of these machines and entitled to their possession is amply supported by the evidence, as is also the finding as to the value of the machines.

We are in accord with the determination reached by the trial court and the judgment is therefore affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 362

## VITRANO et al. v. WESTGATE SEA PRODUCTS CO. et al.

Civ. 2085.

District Court of Appeal, Fourth District, California.

June 14, 1939.

**Appeal and error 🔑773(3)**

Where, after notice of motion to dismiss appeal for failure to file brief was filed but prior to time set for making the motion an opening brief was filed on behalf of appellants, motion to dismiss appeal would be denied.

---

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Josephine Vitrano and others against the Westgate Sea Products Company, a corporation, and others. From an adverse judgment, plaintiffs appeal. On motion to dismiss the appeal.

Motion denied.

A. T. Procopio, of San Diego, for appellants.

Wright, Monroe, Harden & Thomas, of San Diego, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal upon the ground that no brief was filed by the appellants within the time provided for in the rules governing this court and that there was an unreasonable delay in this respect. After notice of the motion was filed but prior to the time set for making the motion, an opening brief was filed on behalf of the appellants. Similar circumstances have been held sufficient to justify the denial of such a motion. Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564; Graybiel v. Consolidated Ass'ns, Ltd., 14 Cal.App.2d 547, 58 P.2d 665; Hall v. Wolford, 22 Cal.App.2d 537, 71 P.2d 596. While the delay here was longer than that in the cases cited we are inclined to apply the same rule in view of certain circumstances which here appear.

The motion to dismiss is denied.

I concur: MARKS, J.

## In re WAITE'S GUARDIANSHIP.*

## CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al. v. WAITE.

Civ. 11086.

District Court of Appeal, First District, Division 2, California.

June 12, 1939.

Rehearing Denied July 12, 1939.

Hearing Granted Aug. 10, 1939.

**1. Insane persons 🔑20**

The statute relating to the appointment of guardian of the person or estate of an incompetent includes cases to be proved solely by testimony of medical experts, cases to be proved by testimony of lay witnesses, and cases to be proved by both classes of testimony. Probate Code, § 1460.

**2. Insane persons 🔑20**

In proceeding to appoint guardian of estate and person of alleged incompetent, court had statutory right to limit petitioner to testimony of two medical experts appointed by court to examine alleged incompetent. Code Civ.Proc. § 2044; Probate Code, § 1460.

**3. Insane persons 🔑20**

In proceedings to appoint guardian of person and estate of alleged incompetent where court offered to hear any testimony by a medical expert offered by the incompetent, exclusion of testimony of lay wit-

*For subsequent opinion see 97 P.2d 238.

nesses was proper. Probate Code, § 1460; Code Civ.Proc. § 2044.

**4. Insane persons** ⟹20

In proceeding to appoint guardian of estate and person of alleged incompetent, refusal to permit alleged incompetent to testify was not error. Probate Code, §§ 1460, 1461.

**5. Insane persons** ⟹2

Testimony of medical expert that alleged incompetent was overcredulous and likely to be deceived or imposed upon by artful and designing persons was sufficient to warrant appointment of guardian of person and estate of alleged incompetent on ground that, by reason of old age and illness and weakness of mind, she had become mentally incompetent either to care for herself or to manage her property. Probate Code, § 1460.

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the guardianship of Fannie Rollins Waite, incompetent. From an order appointing the Crocker First National Bank of San Francisco, guardian of the estate and Pearl Stewart, guardian of the person of Fannie Rollins Waite, the alleged incompetent appeals.

Affirmed.

Clarence E. Rust, of Oakland, for appellant.

James E. Colston, of San Francisco (Richard C. O'Connor, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

On the application of Mrs. Waite's daughter, the trial court appointed a guardian of Mrs. Waite's estate and appointed the daughter the guardian of the person of Mrs. Waite. From that order Mrs. Waite has appealed.

On August 15, 1938, Pearl Stewart, respondent herein, filed in the office of the county clerk of the city and county of San Francisco, her verified petition alleging the incompetency of appellant herein, and praying for the issuance of letters of guardianship over the person and estate of appellant, who is the mother of Pearl Stewart. Service of the usual citation was duly made upon the appellant, after which she appeared in court, with counsel, at the time set for the hearing. The petition alleged: "That the said Fannie Rollins Waite, by reason of old age and illness, and weakness of mind, has become mentally incompetent, either to care for herself or to manage her property; and is unable, unassisted, properly to manage or take care of herself or her property, and by reason thereof is likely to be deceived and/or imposed upon by artful and designing persons."

Pursuant to stipulation made in open court by counsel for the petitioner and counsel for the alleged incompetent, Doctors Stockton and Rethers were appointed by the court to examine the alleged appellant and report on her physical and mental condition. Each had completed his examination of appellant before the cause was heard, and both were called by the respondent to make their report; both were likewise subjected to cross-examination by appellant's counsel.

At the conclusion of the testimony of the experts, counsel for respondents announced that there were eight more witnesses ready to testify; the court asked if they were lay witnesses, and on being informed that they were, announced that it did not wish to hear any lay witnesses. Counsel for appellant then offered to put the appellant on the stand. The court declined to hear her on the ground that it was not competent to form any opinion as to her mental condition. The court at the same time announced it was willing to hear medical testimony on appellant's behalf, but none was offered by her counsel. Later evidence as to the status of appellant's bank account was introduced and the court made the order appointing the guardians.

Appellant's brief intimates that the eight lay witnesses were offered by appellant, and that the court refused to hear them. The record does not show appellant offered them. The eight lay witnesses were apparently offered by the petitioner, respondent herein; no witnesses whatever were called or offered by appellant except herself.

[1-3] The appellant's first point is that the court erred in refusing to permit appellant's witnesses to be sworn and testify, for the reason that such conduct deprived appellant of her property and liberty without due process of law. The materiality of that contention turns on the issues on trial. The jurisdiction of the court is defined by section 1460 of the Probate Code. That

section provides that the superior court may appoint a guardian of the person or of the estate, or both, of an incompetent person and that an incompetent person means or refers "* * * to any person whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons". The scope of that jurisdiction shows at once that it includes (1) cases to be proved solely by testimony of medical experts; (2) cases to be proved by the testimony of lay witnesses; and (3) cases to be proved by both classes of testimony. The petition in the instant case pleaded a case within the third class. However, in presenting her petition, the petitioner commenced by calling the two experts theretofore appointed by the court. After they had testified the court remarked that it was satisfied. In making that remark in effect it limited the petitioner to the testimony of the two experts that had been examined. It had the statutory right to make that ruling. Code Civ.Proc. sec. 2044. The court's ruling in like manner limited the petitioner to the testimony of experts and excluded testimony of lay witnesses. By a parity of reasoning the court acted within its powers in so holding. As shown above, the court offered to hear any testimony by medical experts offered by the incompetent but she did not offer any such testimony. As the petitioner had not offered the testimony of any lay witnesses there was no occasion for the incompetent to do so. In short, the incompetent may complain of the evidence as being insufficient but she makes no showing that any of her fundamental rights were ignored.

[4] The appellant's second point is that the trial court erred in refusing to permit her to be sworn and testify. She asserts the law specifically contemplates such procedure. She cites and relies on Matter of Coburn, 165 Cal. 202, 131 P. 352. That case is not helpful. It was based on a section of the Code of Civil Procedure that has been materially amended. Appellant also cites and relies on section 1461 of the Probate Code. But an examination of that section does not disclose anything supporting the contention which the appellant now makes.

The last point made by the appellant is that the evidence was insufficient to justify the order. We have examined the briefs and we have read the reporter's transcript of the testimony taken before the trial court. After having done so we are unable to hold that the last contention of the appellant is well founded. Both Dr. Stockton and Dr. Rethers, the two experts above mentioned, were called as witnesses by the petitioner. The direct examination and the cross-examination proceeded as though the history of the appellant's business transactions, marital ventures, the condition of her health during the preceding four years, and her comings and goings during said period, were known by each expert. Whether they got such information from the appellant, from the petitioner, or how, does not appear. Among others the following facts were taken into consideration by the two experts in giving their testimony. The hearing was had September 2, 1938. At that time the appellant was seventy-eight years of age. Her second husband died in 1935, leaving her $31,000. In 1936, she married for the third time but was soon after divorced. The latter venture cost her $4,000. Later she purchased a ranch in Alameda county, paying $8,000 therefor and $850 for cattle. She then gave to her chauffeur a one-half interest in the ranch and stock. At the time of the hearing she had left cash deposited in the bank amounting to about $16,000. At the time she purchased the ranch and at the time of the hearing the appellant was crippled with arthritis and was compelled to use a cane to walk. She had become dissatisfied with the purchase of the ranch and was anxious to get rid of it.

[5] Basing their testimony on the foregoing facts and a personal examination of the appellant, the experts gave the following testimony. Dr. Stockton testified he found the appellant was over credulous—a serious defect in judgment. He also found she was of such an age and of such a mental condition that she is likely to be deceived or imposed upon by artful and designing persons. Dr. Rethers, after having testified that the appellant at the age of seventy-six married a man of the age of forty-five, further testified that the facts showed mental subnormality. After some of the business transactions had been recited to him he testified that the appellant was over-credulous and showed a lack of judgment. Therefore we think it may not be said that the evidence is insufficient to

support the allegations contained in the petition. Matter of Coburn, 165 Cal. 202, 216, 131 P. 352.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

33 Cal.App.2d 315

## In re WAITE'S GUARDIANSHIP.

## CROCKER FIRST NAT. BANK OF SAN FRANCISCO v. WAITE.

Civ. 11087.

District Court of Appeal, First District, Division 2, California.

June 12, 1939.

**1. Insane persons** 🔑65

A decree of a court of record directing guardian of alleged incompetent to pay claims against estate would be presumed to have been made by the court acting within its jurisdiction where record did not disclose circumstances under which decree was made.

**2. Insane persons** 🔑33(2)

Under statute relating to appeal from order appointing guardian of incompetent court appointing guardian of incompetent, pending appeal from order appointing guardian, had jurisdiction to order guardian to pay claim against estate since statute does not suspend powers of guardian for all purposes. Probate Code, § 1631.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the guardianship of Fannie Rollins Waite, incompetent. From an order directing the Crocker First National Bank of San Francisco as guardian of the estate of the incompetent to pay certain claims, Fannie Rollins Waite, alleged incompetent, appeals.

Affirmed.

Clarence E. Rust, of Oakland, for appellant.

James E. Colston, of San Francisco (Richard C. O'Connor, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

On September 2, 1938, the superior court made the order appealed from "In the Matter of the Guardianship of Fannie Rollins Waite, Incompetent", Cal.App., 91 P. 2d 617, this day filed. Thereafter claims were presented to Crocker First National Bank of San Francisco as guardian of the estate of the incompetent. Later the guardian applied to the court for directions. After a hearing duly had the court made an order directing said guardian to pay the said claims. From that order the incompetent has appealed and has brought up the judgment roll only.

[1, 2] She contends that the trial court was without jurisdiction. That contention is based on the claim that when letters of guardianship were issued the incompetent took an appeal and as she claims said appeal suspended the powers of the guardian. The contention presents for consideration the construction of section 1631 of the Probate Code. It is as follows: "Effect of appeal. An appeal from an order appointing a guardian for an insane or incompetent person shall stay the power of the guardian, except that, for the purpose of preventing injury or loss to person or property, the court making the appointment may direct the exercise of the powers of the guardian, from time to time, as though no appeal were pending, and all acts of the guardian pursuant to such directions shall be valid, irrespective of the result of the appeal." It is at once apparent said statute provides that the stay arising by reason of an appeal in such a proceeding is not unlimited. Under certain circumstances "for the purpose of preventing injury or loss to person or property, the court making the appointment may direct the exercise of the powers of the guardian, from time to time, as though no appeal were pending, and all acts of the guardian pursuant to such directions shall be valid, irrespective of the result of the appeal". As the decree was made by a court of record the presumption is that the order appealed from was regularly made by the court acting within its jurisdiction. As the record does not show us what the circumstances were in the instant case

prompting the trial court to make its order, this court is bound to assume that a proper set of circumstances was shown.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

33 Cal.App.2d 346

## Ex parte ANDERSON.

Cr. 3202.

District Court of Appeal, Second District, Division 1, California.

June 14, 1939.

**1. Criminal law ⚷115**

Where, after jury had been selected in a justice's court, cause was transferred for trial to another county on consent of defendant and jury, to secure a courtroom affording more accommodations for jurors, action of the court in moving the place of trial did not constitute a "change of venue," within the statutory provision governing change of venue. Pen.Code, § 1431, subd. 3.

[Ed. Note.—For other definitions of "Change of Venue," see Words & Phrases.]

**2. Criminal law ⚷102**

Where cause in justice court was transferred for trial to another county after jury had been selected to secure a courtroom affording more accommodations for jurors and consent to effect change by defendant and jury appeared in the record, removal of place of trial was but an alleged error in procedure, and trial court did not lose jurisdiction of the cause. Pen.Code § 1431, subd. 3.

**3. Habeas corpus ⚷27**

The removal of the cause in justice court for trial to another county after jury had been selected, the defendant having consented to the change, being but an error in procedure, not jurisdictional, was not reviewable in a proceeding by defendant to secure his release after judgment of conviction by a writ of habeas corpus.

Thomas Anderson was convicted of disturbing the peace and seeks a writ of habeas corpus to secure his release from restraint.

Writ discharged.

James C. Hollingsworth, of Ventura, for petitioner.

M. Arthur Waite, Dist. Atty., and Hal V. Hammons, Jr., Deputy Dist. Atty., both of Ventura, for respondent.

DORAN, Justice.

In his petition for a writ of habeas corpus, Thomas Anderson seeks to be released from restraint under a judgment convicting him of the offense of disturbing the peace. It is claimed by petitioner that the justice's court of Camarillo township exceeded its jurisdiction.

The facts are as follows: On December 15, 1938, a warrant of arrest on the above-mentioned charge was issued by W. H. Miller, the justice of the peace of Camarillo township. Defendant Anderson entered a plea of not guilty to the charge. The cause was set for trial by jury on February 14, 1939. Prior to that date Judge W. H. Miller was served with a subpoena to appear as a witness for and on behalf of defendant Anderson. Judge Miller, deeming himself disqualified, requested the justice of the peace of Ventura township, Judge J. C. P. Moore, to come to Camarillo to act as justice of the peace of Camarillo township for the purposes of the proceedings in the Anderson trial. Thereafter a jury was duly selected and sworn. The cause was then transferred for trial to the courtroom of Judge J. C. P. Moore in the county courthouse at Ventura, California. The discussion relative to this transfer was revealed by the record to be as follows:

"Mr. Waite (District Attorney of Ventura County): Now, if the Court please, in discussing this matter with Mr. Kidder the defense suggested the courtroom was so small, if it would be convenient for the jurors to hold this hearing in Ventura where there are facilities and accommodations for the jurors in the courtroom there, it be transferred there. Mr. Kidder states it is agreeable to him. I think it is a matter to be left with the discretion of the jury, inasmuch as they are the ones who will be inconvenienced more than anyone else.

"Mr. Kidder (Defendant's Counsel): I might add, Mr. Waite, this additional information; from information in my possession I believe there will be not less than 40 witnesses produced both for the People and the defense in this case, several days of trial, and it will be hard trying. It would perhaps be of considerable aid to the jury if we have comfortable quarters in which to work, and I know that the district attorney would favor it, and I know that I favor it, and, I think, neither the judge nor the court reporter would have any objection if the jury were willing to have the case tried there, and the defendant is willing to waive any jurisdictional matters in having the case tried there rather than tried here. Everyone feels we have been crowded here today, and the breathing is not so good, and we can have ample quarters there through arrangements made by the County to try the case if the jury would be willing to appear there.

"The Court: Ladies and Gentlemen of the Jury, you have heard the suggestion to transfer the case, and it is acquiesced in by Mr. Kidder, attorney for the defendant, to transfer this cause to my courtroom or the justice courtroom of Ventura where there is plenty of room, and better accommodations and the lighting, and the rest of it. Are you willing to continue the case at Ventura?

* * *

"The Court: Let us take another vote. How many are willing?

"(Whereupon, the hands of all jurors were raised.)

"The Court: Very well. Everybody satisfied now. That will be the order of the Court, that the further trial of this cause will be transferred to the justice courtroom in the city of Ventura in the courthouse at Ventura for further trial at 10:00 o'clock tomorrow moning.

"Mr. Waite: May the record show at this time, Mr. Anderson, you request the transfer, do you?

"Mr. Kidder: We consent to it.

"Mr. Waite: If he makes the request and waives any formality—

"Mr. Kidder: We so request.

"Mr. Waite:—there will be no question on it."

The cause was thereafter tried in Ventura township before Judge Moore, as acting justice of the peace of Camarillo township. A verdict of guilty was returned by the jury, and the judgment followed.

Petitioner contends that all of the proceedings had upon the trial, and subsequent thereto, are null and void and of no effect for the reason that "The case commenced * * * in Camarillo Township * * * and ended in another," as a result of which, it is argued, the court lost jurisdiction. It is urged in that connection that, before a valid transfer can take place, the procedure declared by section 1431 of the Penal Code must be followed. Subdivision 3 of section 1431 is as follows: "Change of venue, when granted. If the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences: * * * 3. When it appears from affidavits of the prosecution that such change will be for the convenience of the people and of the defendant and when the defendant and his attorney, if any, consent in writing, to such change, the cause must be transferred to a justice of another township in the same county."

[1-3] The above provision has no application to a determination of the question here presented. A change of venue, as contemplated by that provision of the law, was not attempted. Nor did the action of the court in moving the place of trial amount to a change of venue within the meaning of such provision. At most the removal of the place of trial under the circumstances was but an error in procedure, which error was not jurisdictional. Such an error cannot be reached by writ of habeas corpus. The proper remedy was by appeal.

The petitioner is, therefore, remanded, and the writ is discharged.

We concur: YORK, P. J.; WHITE, J.

33 Cal.App.2d 245

## GOODSPEED et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6011.

District Court of Appeal, Third District, California.

June 8, 1939.

As Modified on Denial of Rehearing July 8, 1939.

See 92 P.2d 410.

**1. Fraud 🔑53**

Where complaint alleged that defendants falsely represented that defendant canal company was a mutual water company, that the only way plaintiffs could obtain water for land was to purchase stock of canal company, and that stock was valid, that contract of purchase was executed in reliance upon the representations, that representations were false, and that canal company was a public utility, complaint stated but one cause of action, notwithstanding further allegation relating to fact that no permission of Railroad Commission to sell stock had been obtained, since such further allegation was made merely to substantiate the allegation of falsity of the representations. Gen.Laws 1931, Act 6386, § 52(d).

**2. Appeal and error 🔑1010(1)**

Where complaint stated only one cause of action and that for fraud inducing purchase of stock, judgment for purchasers could not be sustained solely on sale of stock without permit of Railroad Commission. Gen.Laws 1931, Act 6386, § 52(d).

**3. Public service commissions 🔑19(1)**

The final determinations of Railroad Commission within its jurisdiction have the formality of judgments of courts of record and within its limited sphere its determinations and orders are conclusive.

**4. Public service commissions 🔑18**

The existence of a public utility within the meaning of the law is in its essence a pure question of fact, as regards weight to be given to such finding of Railroad Commission.

**5. Public service commissions 🔑18**

Findings of fact by the Railroad Commission are to be accorded similar weight to that given verdicts of juries.

**6. Judgment 🔑641**

Finding of Railroad Commission, in proceedings in rem involving question whether canal company was a public utility or a mutual water company, that company was a public utility, was conclusive upon status of canal company in subsequent action to recover damages arising out of alleged fraudulent representations inducing purchase of canal company stock, where finding could be reasonably construed to apply to the status of canal company not only at the time of the institution of the proceedings but at all times during which it and its predecessor offered for sale and sold water for irrigation service.

**7. Fraud 🔑58(2)**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of shares of stock, evidence sustained finding that at time of sale canal company was a public utility rather than a mutual water company as represented.

**8. Public service commissions 🔑32**

Appellate court could not interfere with finding of Railroad Commission made in the exercise of its lawful jurisdiction.

**9. Appeal and error 🔑1010(1)**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of stock of canal company, trial court's finding that canal company at time representations were made and stock sold was a public utility and not a mutual water company as represented could not be disturbed where supported by evidence.

**10. Fraud 🔑58(2)**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of stock of canal company, evidence justified conclusion that canal company knew during all times involved that it was not operating freely as a bona fide mutual water company as represented, but that it was at all times nothing more than a corporate fiction completely dominated by a public utility. Civ.Code, §§ 1709, 1710.

**11. Fraud 🔑13(2)**

Where canal company knew that it was not operating freely as a bona fide mutual water company, but was completely dominated by a public utility, and, nevertheless, represented, in inducing purchase of its stock, that it was a mutual water company, the representation was a fraudulent deceit which entitled the aggrieved party to any damage caused thereby. Civ.Code, §§ 1709, 1710.

**12. Fraud 🔑58(1)**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of stock of canal company, a public utility, represented to be a mutual water company, evidence sustained finding that contracts for sale of stock were fraudulent and void. Civ.Code, §§ 1709, 1710.

**13. Public service commissions 🔑6**

The Railroad Commission has no jurisdiction to try a civil action arising out of a tort.

**14. Judgment 🔑641**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of corporate stock, a finding of Railroad Commission, which has legally and finally adjudicated one of the issuable facts, may be used to establish such fact, although it appears that such fact is a part of the factual structure of plaintiffs' case involving fraud.

**15. Contracts 🔑164**

Where the language of two instruments indicates that they are intended to become a part of one transaction, they should be construed together. Civ.Code, § 1642.

**16. Fraud 🔑57**

Where contract for purchase of stock of canal company and water agreement were dependent one upon the other and stock contract would not have been executed unless agreement to purchase water was also made, the contracts constituted one indivisible transaction so that if, by purchasing stock, purchasers received water at a rate under its fair market value, canal company was entitled to make such proof in connection with damages which purchasers claimed in action for fraud in stock purchase contract. Civ.Code, § 1642.

**17. Fraud 🔑57**

Where contract for purchase of stock of canal company and water agreement were dependent one upon the other and stock contract would not have been executed unless agreement to purchase water was also made, in purchasers' action for fraud inducing execution of stock contract, canal company's evidence, that contract price of water was substantially lower than reasonable value of such water, offered for purpose of having benefit received by purchasers offset against the detriment, was admissible. Civ.Code, § 1642.

**18. Fraud 🔑57**

In action for damages resulting from fraudulent representations inducing purchase of stock of canal company, where canal company was entitled to set off difference between contract price of water received by purchasers and reasonable value of such water, evidence of such reasonable value would be charges for similar service under similar conditions.

**19. Fraud 🔑57**

The fact that only landowners executed contract for purchase of stock of canal company, but that landowners and also husband of one of landowners executed water service contract, did not preclude the consideration of the two contracts as one indivisible transaction, where the husband had no interest in the lands to be irrigated under the water service contract, as regards canal company's right to prove receipt of water under fair market value by purchaser suing for damages on account of fraud. Civ. Code, § 1642.

**20. Courts 🔑1**

The primary duty of courts is to see that substantial justice is done.

**21. Fraud 🔑60**

In action to recover damages arising out of alleged fraudulent representations inducing purchase of corporate stock, purchasers were entitled to interest at legal rate on principal amount paid under stock purchase contract and also interest upon the interest paid under contracts from date of payment of each installment of interest. Civ. Code, § 3287.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Isabelle A. Goodspeed and another against the Great Western Power Company of California and another to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. From the judgment, plaintiffs and defendants appeal.

Judgment reversed and cause remanded for retrial on issue of damages.

Ware & Ware, of Chico, for appellants.

Eustace Cullinan, Thomas J. Straub, W. H. Spaulding, and W. R. Dunn, all of San Francisco, and Jerome D. Peters, of Chico, for respondents.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiffs upon all such issues, and judgment was rendered against defendants in the sum of $13,061.32. An appeal is taken from the judgment by defendants. Plaintiffs also appeal from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiffs were not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiffs and received by defendants on account of the purported purchase of stock of defendant Western Canal Company, one of which payments on account of interest was made on December 31, 1927, in the sum of $505.00, and another of which payments on account of interest was made on December 3, 1929, in the sum of $1,206.98, and another of which payments on account of interest was made on January 12, 1932, in the sum of $1,743.09."

The pleadings are exceedingly voluminous, but the essentials of the cause of action alleged are fairly simple in their outlines. The complaint alleges that at all times defendant power company was a corporation organized under the laws of the state of California, and a public utility during said times; that defendant canal company was and is a corporation organized under the laws of California, and "the wholly owned, operated and controlled creature and alter ego of defendant Power Company"; that defendants falsely and fraudulently represented to plaintiffs that defendant canal company was a mutual water company; that the only way plaintiffs could obtain irrigation water for their lands was to purchase a certain number of shares of the corporate stock of defendant canal company, and that said stock would be, at all times after it was issued, good and valid, and that the contracts for the purchase of the stock would be good and valid; that contracts for the purchase of said stock were executed by plaintiffs and defendant canal company, and that plaintiffs relied upon the truth of said representations in entering upon and executing said contracts; that said representations were false; that plaintiffs did not discover the falsity of said representations until the 31st day of October, 1932, on which date the Supreme Court of California adjudicated that at all the times mentioned in the complaint defendants and each of them were public utilities and that defendant canal company never was a mutual water company.

It is also alleged that plaintiffs received nothing whatever because of the making of said contracts for the purchase of said stock and that said contracts were made without any consideration whatever, and that each of them now is wholly void and of no worth or value; and that the total amount paid for said stock under said contracts was $12,500, and that by reason of the facts alleged, plaintiffs have been damaged in said sum.

The answers of defendants put in issue all the foregoing facts, and in addition they set forth, very fully, certain facts to support the defense that they were acting in good faith throughout the entire transactions mentioned in the complaint.

The trial court found in favor of plaintiffs on all issues, in a voluminous document which takes up sixty-six pages of the transcript. Much superfluous evidentiary is set forth. Such extended findings might be due to an abundance of precaution or to the numerous collateral issues which were presented.

Defendant canal company was organized January 28, 1915, as a mutual water company under the laws of the state of California. The articles of incorporation provide, in part, that the purposes for which said corporation is formed are: "To supply water for irrigation and domestic use to the stockholders of said corporation, and only to said stockholders, for use on land owned or being purchased by said stockholders, aggregating approximately two hundred thousand acres situate in the counties of Butte, Sutter, Glenn and Colusa, State of California, within the area bounded on the east by the Feather and Yuba Rivers, on the west by the Sacramento River, and on the north by parallel number twenty (20) north, Mt. Diablo Base, and on the south by parallel number fifteen (15) north, Mt. Diablo Base."

The by-laws of said corporation provided in part: "It is hereby provided and made a part of the contract between this corporation and each and all of its stockholders, that from and after the purchase by any stockholder of this corporation of water from this corporation, and the use of such water upon lands within the area aforesaid which are owned or being purchased by such stockholder, as aforesaid, shares of stock of such stockholder equivalent in number to the number of acres, of such land, upon which such water is used, shall become appurtenant to such land."

Plaintiffs were the owners of lands available for irrigation water under said articles and by-laws, and on April 30, 1927, they executed a contract with defendant canal company to supply water for irrigation purposes upon said land. The contract provided in part as follows:

"Contract to Sell Water
Between
Western Canal Company
And
Mrs. Isabelle A.
Goodspeed, a widow, (I.A.G.
Vera E. Upphoff V.E.U.
and Hugo Upphoff her H.U.)
husband:

"This agreement, made this 30th day of April, 1927, between Western Canal Company, a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter called the Water Company, first party, and Isabelle A. Goodspeed, a widow, Vera E. Upphoff and Hugo Upphoff, her husband, of the County of Butte, State of California, hereinafter called the Consumer, second party —Witnesseth:

"First. That in consideration of the promises and covenants, and the due fulfillment thereof, on the part of the Consumer herein, the Water Company agrees, under the terms, conditions, limitations, and restrictions herein stated, to furnish during the irrigation season each year as herein defined, to the Consumer, water in the amounts hereinafter specified. Throughout this agreement the Consumer includes singular and plural, and if there is more than one second party, they are jointly and severally obligated hereunder, and the masculine includes the feminine and neuter gender.

"The quantity of water herein agreed, subject to the terms hereof, to be furnished by the Water Company to the Consumer shall be, and shall not exceed, such quantity of water as shall be required, when economically used, to irrigate a maximum of Nine Hundred Ninety nine and thirty seven hundredths (999.37) acres of Consumer's land, but in no event to exceed Six Thousand Nine Hundred Ninety-three (6993) acre feet of water per annum.

"The Consumer owns the following land situate, lying, and being in the County of Butte, State of California, and particularly described as follows:

"The South 83.72 acres of the south half of south half of Section 13, which lies west of Butte Creek; the south 115.65 acres of Section 14; the north half of Section 22; all of the north half of Section 24 which lies west of Butte Creek, 160 acres; and the North half of Section 23—all in Township 20 north, Range 1 East, and Aguas Frias Rancho; total acreage 997.37.

(I.A.G.
V.E.U.
H.U.)

"It is understood that the Consumer is to irrigate hereunder a minimum of Four Hundred Fifty (450) acres of said land, and has the right to increase the acreage up to Nine Hundred Ninety-nine (999) acres as herein provided, and subject to the terms hereof.

"It is also hereby agreed that the Water Company shall not be obligated to furnish any water hereunder for use on any land until the Consumer has water-stocked such land as herein provided.

"The Water Company is a mutual water company and it is necessary for the consumer to become a member of the Water Company by becoming a stockholder, i. e., to acquire a share of stock of the Water Company for each and every acre of Consumer's land irrigated hereunder and to apply each such share to an acre of land and render such stock appurtenant thereto. The Consumer therefore shall immediately hereafter, or as soon as practicable designate to the Water Company the Four Hundred Fifty (450) acres of said land of the Consumer, and also such excess above Four Hundred Fifty (450) acres up to the maximum of Nine Hundred Ninety-nine (999) acres in all of Consumer's said land to be so water-stocked, and Consumer shall acquire as and when such designation or designations are made the proper certificates of stock containing the description of the land to which such stock is to be appurtenant; provided however that after XXXXX years from the date hereof no additional land of the Consumer shall be water-stocked without the written consent of the Water Company first obtained. * * * For the water herein agreed to be furnished, the Consumer in consideration of the premises, hereby promises and covenants to pay each year in Gold Coin of the United States to the Water Company or its assigns, at its offices, as follows:

"At the rate of Six Dollars per year for each acre of land irrigated during such year for raising rice; and Two Dollars per year, for each acre of land irrigated during such year for raising crops other than rice; Provided, however, that the Consumer shall each year pay in addition to the Six Dollars hereinabove specified, at the rate of one Dollar per acre foot for each acre of water delivered during such year for raising rice in excess of six acre feet on any acre of land; and in addition to the Two Dollars hereinabove specified at the rate of One Dollar per acre foot for each acre foot of water delivered during such year for raising any crop or crops other than rice in excess of two acre feet on any acre of land."

On the same day, April 30, 1927, the same parties executed a contract for the purchase of stock, which reads as follows:

"This agreement, made and entered into this 30th day of April, 1927, by and between Isabelle A. Goodspeed, and Vera E. Upphoff, first party, hereinafter called the 'Subscriber', and the Western Canal Company, a California corporation, second party, hereinafter called the 'Company,'—Witnesseth:

"That Whereas, the Company is a mutual company and sells water only to its stockholders; and

"Whereas, the Subscriber is desirous of acquiring capital stock of the Company upon the terms hereinafter set forth, it being a necessary condition to his right to take water from the Company, that such stock be acquired, and it being hereby understood and agreed between the parties hereto that the rights, and each of them, of the Subscriber under any water contract are conditional upon, and exist only during the fulfillment by the Subscriber of each and all obligations, promises and agreements of the Subscriber hereunder.

"Now therefore, the parties hereto hereby agree as follows:

"If the Subscriber is more than one person, the promises and obligations of the Subscriber hereunder are joint and several promises and obligations.

"The Subscriber hereby subscribes for and promises and agrees to take, purchase and pay for Four Hundred Fifty (450) shares of the capital stock of the Company, at the price of Thirty Five Dollars ($35.00) per share, to-wit, the sum of Fifteen Thousand Seven Hundred Fifty ($15,750.00) payable as follows:

"Two Dollars and fifty cents ($2.50) per share upon the execution hereof, Two Dollars and Fifty cents ($2.50) per share on or before the first day of January, 1928, and the balance of purchase price, to-wit, the sum of Thirteen Thousand Five Hundred Dollars ($13,500.00) payable in twelve (12) annual installments of Eleven Hundred Twenty-five Dollars ($1125.00) each, the first of said installments being payable on or before January 1, 1929, and one of said installments being paid on or before the first day of January each and every year thereafter, until the said sum of Thirteen Thousand Five Hundred Dollars ($13,500.00) is fully paid with interest on deferred payments of such purchase price from the date hereof, at the rate of 6% per annum, payable annually on the first day of January, each and every year commencing the first day of January, 1928, provided that if default be made by the Subscriber in the payment of any of the principal or interest as herein provided, then, at the option of the Company, the entire unpaid principal sum of said purchase price, and all interest accrued shall immediately become payable. The Company in consideration of the said subscription and promises of the Subscriber, hereby promises and agrees to cause to be transferred to the Subscriber said Four Hundred Fifty (450) shares of said stock, upon full payment of the purchase price thereof, and interest thereon, as above provided, said stock to be and become appurtenant to, and to run with the land belonging to the Subscriber, one share of said stock to become appurtenant to each acre of land, said land being described as follows:

"A part of the N. ½ of Section 22, containing 310 acres, and parts of the W. ½ of Section 23 and 24, containing 140 acres, making total lands waterstocked and an adjust-acres, more or less, being the same number of acres as above mentioned number of shares of water-stock hereby subscribed for all in Aguas Frias Rancho and in Township 20 North, Range 1, East.

"It is understood by both first and second parties that this Fall an accurate survey will be made of lands waterstocked and an adjustment made accordingly.

"This agreement, and each and all of the terms and provisions hereof, shall govern and bind and run in favor of the parties hereto.

"Western Canal Company
"(By (Signed) W. H. Spaulding
"(Seal) President
"(By (Signed) L. A. Reynolds,
"Asst. Secretary.
"Isabelle A. Goodspeed (Signed)
"Subscriber.
"Vera E. Upphoff (Signed)."

On January 1, 1928, the same parties executed a contract substantially the same as the two last mentioned, providing for the purchase of 921 shares of stock at $25 a share. (This contract, according to the evidence, superseded the other stock purchase contract mentioned above, and was the one which the parties acted upon and carried out.) This contract was not actually delivered until December 13, 1929. Water deliveries were duly made to plaintiffs by defendant canal company, and payments were made on said stock for several years without any question having been raised by plaintiffs as to the legality of such transactions. On December 21, 1931, upon complaint of Sarah E. Ludy against Western Canal Company (one defendant herein), and after an extended hearing, the railroad commission of the state of California found that the canal company was in fact a public utility and not a mutual water company, and ordered said corporation to file rates and regulations with the commission covering irrigation water service for lands served under its canal system. On October 31, 1932, the order of the commission was upheld by the Supreme Court. Western Canal Co. v. Railroad Commission, 216 Cal. 639, 15 P.2d 853. It was these proceedings, the trial court found, which first brought to the attention of plaintiffs the facts as to the true corporate character of the canal company.

Following the adjudication by the railroad commission and Supreme Court to the effect that defendant canal company was a public utility and not a mutual water company, this action was commenced.

The nature of the cause of action is the subject of considerable discussion in the briefs of both parties. We are of the opinion that this question was definitely settled by this court when the case was before us upon an appeal from an order denying the motion of defendants for a change of venue. Goodspeed v. Great Western Power Co. et al., 135 Cal.App. 687, 27 P.2d 937. We there said:

"The complaints are quite lengthy, but it is only necessary for the purpose of this appeal to refer to the facts involving venue. The actions are for recovery of damages for fraud. It is alleged that the Western Canal Company was a corporation wholly owned, operated, and controlled by the Great Western Power Company, a corporation, and that the two corporations were public utilities for the purpose of furnishing water for the irrigation of lands within the area where lay the lands of the two plaintiffs.

"The alleged fraud consisted in inducing plaintiffs to make payments of money to defendant Western Canal Company on the alleged false and fraudulent representations that defendant Western Canal Company was a mutual water company, and that plaintiffs could not get water from the company except by purchase of its capital stock, the same to become appurtenant to the lands to be irrigated, and that water would not be furnished plaintiffs unless they so became stockholders. It is then alleged that plaintiffs entered into such contracts to buy stock, make payments upon account thereof, and that they received nothing of value and have been damaged thereby."

Respondents contend that the recovery can be justified upon two grounds; first, that defendants were guilty of actual fraud, arising out of the fraudulent representations mentioned above; and second, that defendants were guilty of constructive fraud in selling stock in a public utility without a permit from the railroad commission of California, and in contravention of section 52, subdivision (d) of Act 6386, General Laws of California, which provides in part as follows: "(d) All stock and every stock certificate or other evidence of interest or ownership, and every bond, note, or other evidence of indebtedness of a public utility, issued without an order of the commission authorizing the same then in effect shall be void."

It will be noted, however, that only one cause of action is set forth in the complaint, which is based entirely upon fraudulent representations. It is alleged in the complaint that defendants fraudulently represented "that said stock would be at all times after it was issued good and valid stock and that the said contracts to purchase the same would at all times after their execution be good, valid, lawful and binding contracts". It is further alleged: "That pursuant to the said fraudulent plans and purposes of defendants, as aforesaid, neither of them obtained, and no one obtained at any time, any permission from the Railroad Commission of the State of California to enter into either of the contracts hereinbefore referred to or to issue or to sell or to agree to sell any stock in said Canal Company, and no permission or ratification by the said Railroad Commission of the execution of either of said contracts herein referred to was ever had or obtained, and that said Railroad Commission never at any time upon any terms or conditions whatsoever authorized the execution of any contract in any form whatever for the sale of any stock whatever in said Canal Company."

[1, 2] It appears to us that but one cause of action is alleged, and that the allegation relating to the fact that no permission of the commission was secured was made in connection with, and to substantiate the allegation of the falsity of the representation made to the effect that the contracts were "good, valid, lawful and binding". It cannot be said, therefore, that the judgment can be sustained solely upon the sale of stock without a permit. Rather, it is predicated upon false representations made in respect to the validity of the stock. It was for this reason that we held in the case of Goodspeed v. Great Western Power Company, (above), that the alleged fraud consisted in inducing plaintiffs to make payments of money to defendants Western Canal Company "on alleged false and fraudulent representations". In that appeal respondents stated the nature of the action to be as follows: "In both of these actions the plaintiffs are seeking to recover damages alleged to have been sustained by them and resulting from fraud practiced upon them by the defendants in the execution of the contracts made by the respective plaintiffs and defendants for the purchase of capital stock in defendant Western Canal Company."

The parties devote much time to this phase of the case, but to us the essentials of the complaint are not so complicated or involved. A reading of the entire pleading leaves no doubt in our minds that the gravamen of the action is alleged false representations for which damages are sought, and it cannot be considered or regarded solely as an action to recover the amount paid for stock issued with a permit from the railroad commission, and that any reference in the complaint to the lack of such permit was made incidentally and in conjunction with the main cause of action. Moreover, we are satisfied that the case was tried upon the theory that it was one for damages arising out of fraudulent representations. Even though it is assumed that the complaint states a distinct cause of action based upon the theory that the stock was void through want of a permit, everything which we have to say later in this opinion as to the indivisibility of the contracts is nevertheless applicable.

The following is a summary of the representations found by the trial court to have been fraudulently made by defendants: That the canal company was a separate and independent corporate entity; that it was a mutual water company; that it could and did serve water only to stockholders; that it was necessary to buy stock in it in order to get water; that it had a right to sell stock; that its stock, so sold, was good and valid stock.

Considering the appeal by defendants while the contentions are extremely numerous, in reality they are based upon two fundamental questions: First: Was defendant canal company, at the time when the contracts were entered into by these parties, and when it represented it was a mutual water company, a public utility under the laws of the state of California? And secondly: If it was, did it know that it then was a public utility and not a bona fide mutual water company? If the record supports an affirmative answer to both of these questions, a cause of action was proven.

In view of the first fundamental question mentioned above, it is the contention of respondents that the status of defendant canal company, as a public utility, had, prior to the trial, been conclusively determined and adjudicated by the railroad commission, and the Supreme Court of this state and the Supreme Court of the United States. The proceedings in the Ludy case, before the commission (mentioned above), were admitted in evidence. The ultimate finding of the commission is as follows: "I find, therefore, that the defendants herein, Western Canal Company and Great

Western Power Company of California, own, control and operate their properties and water rights for the furnishing of water for irrigation and domestic uses for compensation and as public utilities within this State, and that said defendant Corporations are 'water corporations within the definition and meaning of that term as used in the Public Utilities Act and the Act for the Regulation of Water Companies in the State of California."

[3] This finding was taken to the Supreme Court by certiorari, and the finding was upheld, and an order directing defendants to file rates and regulations covering irrigation service was affirmed. Referring to orders of the railroad commission, and the matter of their finality, the following excerpt from the case of People v. Lang Transp. Co., 217 Cal. 166, 169, 170, 17 P. 2d 721, 723, is pertinent: "The proceeding before the commission was in the nature of a proceeding in rem. The commission exercises judicial powers, and its final determinations within its jurisdiction have the formality of judgments of courts of record. Within its limited sphere its final determinations and orders with reference to the condition or relation of the defendants may well be as conclusive as the judgment of a court under subdivision 1 of section 1908 of the Code of Civil Procedure."

The foregoing follows the general rule laid down in Freeman on Judgments, volume 3, page 2617, 5th edition: "As a general rule, whenever any person or persons have authority to hear and judicially determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority. Hence, whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction."

Defendants contend that this adjudication in rem might fix their status as of the date of the initiation of the proceedings before the commission—March 31, 1930—but that it does not relate back to the time when the representations were made and the first purchase of stock—April 20, 1927. The findings of the commission upon the entire evidence presented at the hearing read as follows: "From the entire evidence presented concerning the water operations of these defendants, it must be found that the Great Western Power Company of California holds its property and water rights subject to the public use for irrigation and domestic purposes, and that this defendant is primarily responsible for the continuance of that public service. The Western Canal Company is not a mutual water company as defined in the Act for Regulation of Water Companies, and, doubtless, were it standing alone, would not be exempted from the Commission's regulation. It is vested with the legal title to a canal system, a part of which was from the beginning impressed with the public use. But the fact cannot be overlooked that it is wholly a creation of the Power Company, and a device by which the latter has sought to escape its public obligation. The Canal Company owns no water rights, and without these its public utility function must be limited to a mere water transporting agency. But even in this respect, it is only a corporate fiction. Its title to the canal system is only a nominal title. The original purchase price, as seen above, was paid by the Power Company, and all additions thereto have been made by the latter. The Power Company holds all water rights, not only those purchased from the Old Feather River Company, but others acquired in part by the exercise of the right of eminent domain, and necessarily, therefore, devoted to the public use. Moreover, the water service actually rendered during the past fifteen years must be deemed to have been rendered by the Power Company alone, by reason of its complete domination and control over the property and affairs of its subsidiary corporation."

[4-9] "The existence of a public utility within the meaning of the law is in its essence a pure question of fact." Western Canal Co. v. Railroad Commission, (above), 216 Cal. page 645, 15 P.2d page 856. "Findings of fact by it [the Railroad Commission] are to be accorded similar weight to that given verdicts of juries." Western Canal Co. v. Railroad Commission, (above), 216 Cal. page 646, 15 P.2d page 856. We are of the opinion that these findings can be reasonably construed to apply to the status of defendants, not only at the time of the initiation of the proceedings, but at all times during which they or their predecessors offered for sale and sold water for irrigation service. Every fact and cir-

cumstance upon which the opinion of the commission is based antecedes the date when the representations were made and the contracts for the sale of the stock were executed. This is likewise true of the opinion of the Supreme Court when the matter was before them. Furthermore, we are satisfied that there is ample evidence in the record before us to sustain such a finding. We are not permitted under such cirsumstances to set aside the verdict of a jury. Neither can we, under the rule stated above, interfere with a finding of the railroad commission made in the exercise of its lawful jurisdiction. The trial court here found that defendants were, at the time the representations were made and the stock sold, public utilities, and this finding is subject to the same rule. We are satisfied it has sufficient evidentiary support.

Referring to the second fundamental question, many facts are set forth in the answers in support of the defense that defendants acted in good faith, and hence there was no fraud. The trial court found that the representations mentioned above were made by defendants, and this finding is not questioned. The further finding that the representations were made fraudulently, and with intent to deceive, is, however, vigorously attacked by defendants. From an examination of the record in the Ludy case before the commission, and from the record here, it appears that the evidence is substantially the same in each on the question of the status of defendants. On the matter of the real nature of activities of defendant canal company, the court, in the Western Canal case (above) has this to say:

"The canal company thus is made but an outlet for the sale of the stored waters of the power company at a profit, first in the sale of the stock, and, secondly, in the sale of the water. The canal company has no possible chance of independent existence at any time, not even after a sale of all its stock by the power company, which fixes the price. Then, too, its obligation to pay for water it may never sell will keep it in serfdom for an untold period of time. Sixteen years of struggle finds it more deeply enthralled than in the beginning. In practical operation, its status as an independent ego is even worse than these contracts would indicate. Practically all its officers have come from the administrative force of the power company and get their salaries from the latter company. The office equipment and location of both companies is the same. The home and fortune of the canal company, in short, is within the keeping of the power company. The canal company has no bank account apart from the power company. The power company owns 84 per cent. of the stock of the canal company and, as such owner, dictates the latter's every act. This stock, too, is pledged as an asset of the power company to secure its own indebtedness. The canal company has no independent bookkeeping system recording its sales or the status of its contract or water accounts. No land-owning stockholder has ever been notified of or attended a meeting of the stockholders; only about four regular stockholders' meetings have been held in sixteen years. No stockholder without interest in the power company in some form has ever been on the board of directors of the canal company. The stock used to qualify the directors of the canal company is indorsed in blank to the power company. While the canal company has an appropriate set of by-laws, suitable for the management of a mutual water company, these by-laws have been in disuse. Instead of giving the canal company some voice over the price of its own stock, the power company provided a minimum and not a maximum price of $15 per share and some stock has been sold for as high as $35; the canal company being entirely and supinely helpless in this important matter. In short, the canal company has no voice in anything, and its obligations to the parent company are increasing, with no signs of emancipation. Much further evidence of impotency of the canal company could be cited.

"But it is claimed that the holding of this court in Thayer v. California Development Co., 164 Cal. 117, 128 P. 21, would justify the conclusion that the canal company exists as a mutual water company. It is true that there are some points of superficial similarity in the two cases, but there are at the same time marked differences in the organizations under consideration. In the Thayer Case the court found as a fact, contrary to the situation here, that the mutual company had not been controlled or dominated by the development company. The domination here is complete. In the Thayer Case the stock of the mutual company was sold for its own benefit; here, the stock is sold for the exclusive benefit of the power company. In that case the mutual company did not, as here, give the parent company its whole capital stock and allow said company to pledge and traffic in it at will. Neither in the Thayer Case, as here, was the power company authorized to stop the sale of stock at any time and thus be relieved pro tanto of the duty to furnish water. Neither in that case was the mutual company required to make water contracts at rates fixed by the parent company, as is the case here, nor did the mutual company there surrender bodily its management to the power company. * * * We think the Railroad Commissioner was well warranted in looking beyond the corporate forms which clothed the acts of petitioners and in declaring the canal company to be but the agent of the power company."

The trial court, the commission, and the Supreme Court all found that the canal company was under the complete domination and control of the power company. The trial court said: "That at all times referred to in plaintiffs' complaint, defendant Canal Company was, and ever since has been, and now is, a corporation, organized and existing under the laws of the State of California, and said Canal Company was organized and created by the predecessor in interest of the Power Company, and at all times thereafter was, and now is maintained, operated and controlled by said predecessor and the Power Company, and has been at all of said times in conjunction with, and as the owned, operated and controlled creature and alter ego of said predecessor and the Power Company, a public utility for the purpose and charged with the necessity of furnishing water for irrigation, as aforesaid;" The commission said: "It (the Canal Company) is wholly a creation of the Power Company." The Supreme Court stated (Western Canal Co. case, above): "The canal company thus is made but an outlet for the sale of the stored waters of the power company as a profit, first, in the sale of stock, and secondly, in the sale of water. The canal company had no possible chance of independent existence at any time; not even after a sale of all its stock by the power company, which fixes the price. * * * In short, the canal company has no voice in anything, and its obligations to the parent company are increasing, with no signs of emancipation."

It would prolong this opinion to an excessive degree if we elaborate upon the various facts appearing in the record which lead to the foregoing conclusions by three independent tribunals. Some of them are set forth in the excerpt from the opinion of the Supreme Court above. The facts in the record are so cogent and convincing that the conclusion is inescapable that there is sufficient evidence in the record to sustain the following finding of the trial court on the matter of the fraudulent representations: "That each and all of the representations so made by defendants were positive assertions and were not warranted by the information of defendants so making the same, and defendants had no reasonable ground for believing them, or any of them, to be true; that defendants had at hand the means, and were, at all of said times charged with the responsibility of knowing that said statements were untrue; that at the time said representations and statements were made, as aforesaid, and at all times mentioned in plaintiffs' complaint, after they were so made and continuously to the present time, the same were, and each of them was, and they are now wholly false and untrue; that said Canal Company was not, at the time said representations were made, and never has been, and is not now, a separate and independent corporate entity or separately and independently engaged in the sale and distribution of water for irrigation, or a mutual water company;"

[10-12] The facts and circumstances are sufficient to justify the inference and conclusion that defendant canal company, through its officers, knew, during all the times mentioned, that it was not operating freely as a bona fide mutual water company under the laws of this state, but that it was at all times nothing more than a corporate fiction, completely dominated by the power company,—a public utility. This being the truth, the representation that the canal company was a mutual water company was clearly "the suggestion, as a fact, of that which is not true, by one who does not believe it to be true",—sec. 1710, Civ.Code,—a fraudulent deceit which entitled the aggrieved party to any damage caused thereby. Sec. 1709, Civ. Code. A brief reference to some of the facts which justify the conclusion relating to the real status of the canal company is as follows: Title to the physical properties of the canal company and all improvements made thereon were paid for by defendant power company. The officers of the canal company were also officers and employees of the power company. In an agreement between the defendants, all of

the 200,000 authorized shares of stock in the canal company, except 5,000, were to be issued to the power company. The price for which the canal company could sell its stock was fixed in the latter agreement. The stock sold by the canal company was actually owned by the power company. It was voted, pledged and listed as an asset of the power company. No land-owning and water-using stockholder ever attended a directors' or stockholders' meeting in the canal company, nor was any meeting of the stockholders held from February 5, 1915, to August 1, 1927. These are only a few of the many facts and circumstances in the record which would justify a finding to the effect that the canal company never was a bona fide water company, and was only distributing agent for the power company,—a public utility,—and that its officers knew that to be a fact when they represented that they were a bona fide mutual water company and that the stock was good and valid.

Faced with the factual situation outlined in the preceding paragraph, defendants contend that the corporate setup and relations between them has been condoned by our courts, and that certain decisions have upheld the corporate entity, legality and independence of a mutual water company thus organized and conducted, and that whatever was done was therefore performed in good faith, and in reliance upon the pronouncements of the courts of this state. The chief authority urged in support of this defense is the case of Thayer v. California Dev. Co., 164 Cal. 117, 128 P. 21. The same contention was raised in the Western Canal Company case, above, and we rest upon the disposition made of the point in that case. (See quotation from this case above.) The most that can be said of evidence of this character—tending to prove good faith—is that it creates a conflict. On the other side are the facts and circumstances we have enumerated. The trial judge resolved this conflict in favor of plaintiffs, and on appeal we are foreclosed from further inquiry. Concluding our discussion of this phase of the case we hold that the finding of fraud has ample support in the record, and that the trial court properly decreed that the contracts for the sale of stock in the canal company and the stock issued to plaintiffs were fraudulent and void.

[13, 14] In arriving at a conclusion upon this ground of appeal, we have taken the view that the findings of the commission upon the status of defendant canal company are final and conclusive. As to whether or not defendants were guilty of fraud, that issue must be determined solely from the record before us, as the commission clearly has no jurisdiction to try a civil action arising out of a tort. The references and quotations here made from the decision of the commission and the opinion of the Supreme Court are facts and circumstances which were necessary to these adjudications, and which, on the other hand, might be also relevant and pertinent to the issue of fraud. Upon all such issues we have confined ourselves solely to an examination of the record before us. We see no reason, however, why a finding of the commission, which has legally and finally adjudicated one of the issuable facts, should not be used to establish such fact, although it appears that such fact is part of the factual structure of plaintiffs' case involving fraud. It is contended by defendants that the rule is otherwise, and that the issue of the status of the canal company must be retried and determined here, irrespective of the previous adjudication of that issue by the commission and the Supreme Court of this state. It is conceded by all parties that the decision of the commission has the effect of a judgment in rem, but defendants argue that the instant action is one of personam, that therefore the commission's findings cannot be invoked by plaintiffs. Such a rule would, we believe, lead to the utmost confusion. If the judgment of the commission, acting within its jurisdiction, is final, it is final for all purposes and in any character of action or proceeding where the precise matter is again presented for adjudication before any other tribunal, board or commission. So when the parties here went into court they should have proceeded upon the assumption that this issue—the real corporate character of defendant canal company—was no longer open to litigation. The fact that plaintiffs presented evidence on the issue is of no consequence. If the trial court had here found that defendant canal company was not, and never had been, a public utility, it would have been our duty to set aside any judgment based thereon, upon the ground that that issue had been conclusively adjudicated to the contrary by the commission. To hold (as defendants would have it) that the canal company was, as against the world, a public utility, but as

between these parties it was a bona fide mutual water company, would result in the creation of a corporate Janus,—something unknown in law.

The second matter to be considered is that of damages. As we have pointed out, on the same date when the first contract for the sale of stock was made, the parties executed another contract for the delivery of water upon the lands of plaintiffs. Although this water contract was an exhibit in the case upon the part of plaintiffs, it was entirely ignored in the findings. It is set forth, in part, above. At the trial defendants offered the water contract in evidence in connection with the issue of damages, and further offered to prove the reasonable value of all irrigation water delivered to plaintiffs upon said contract, upon the theory that such contract and the stock purchase contracts came under the provisions of section 1642 of the Civil Code, which provides that "several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together." The proffered proof showed that the contract price of water was substantially lower than the reasonable value of such water. Defendants therefore contend that the contracts for the sale of "water stock" were part of the consideration for the fixing of rates which were less than the reasonable value of the irrigation water, and if the stock purchase contracts were voided, and they are compelled to return to plaintiffs all moneys paid for the stock, plaintiffs should not be entitled to retain the benefit of the lower rates under part of the transaction, and yet receive full benefit from another part of the transaction, to-wit: a return of the full price paid for the stock. In other words, defendants contend that they should be allowed to off-set the benefit received by plaintiffs, against the detriment, where the several contracts were in fact but one transaction. The question is, therefore, did the trial court err in refusing the proffered evidence?

[15] In the case of Lynch v. Bank of America Nat. Trust Ass'n, 2 Cal.App.2d 214-222, 37 P.2d 716, 720, this court held that where the language of two instruments indicated that they were intended to become a part of one transaction, they should be construed together. Quoting section 1642 of the Civil Code (above) we said: "The rule that separate written documents between the same parties and relating to the same subject-matter as indicated by the language contained therein, or satisfactorily proved by the circumstances under which they were executed, are to be construed together as one transaction, has been determined by so many authorities there is no room for controversy regarding that principle. Burleson v. Northwestern Mutual Ins. Co., 86 Cal. 342, 24 P. 1064; Hawes v. Lux, 111 Cal.App. 21, 294 P. 1080; 6 Cal.Jur. 298, § 181; 13 C.J. 528, § 487; 6 R.C.L. 850, § 240. This rule applies even though the separate written instruments were not executed on the same date." Applying this rule to the case here, all the facts and circumstances clearly indicate that the stock purchase contracts and the water agreement were dependent, one upon the other, and constituted but one transaction. The stock purchase contracts here under attack each contain the following language: "Whereas the Subscriber is desirous of acquiring capital stock of the Company, upon the terms hereinafter set forth, it being a necessary condition to his right to take water from the Company, that such stock be acquired, and it being hereby understood and agreed between the parties hereto that the rights, and each of them, of the Subscriber under any water contract are conditional upon, and exist only during the fulfillment by the Subscriber of each and all obligations, promises and agreements of the Subscriber hereunder;"

The water purchase contract provided as follows: "The Water Company is a mutual water company and it is necessary for the Consumer to become a member of the Water Company by becoming a stockholder, i. e., to acquire a share of stock of the Water Company for each and every acre of Consumer's land irrigated hereunder and to apply each such share to an acre of such land and thereby permanently to water-stock such land and render such stock appurtenant thereto. The Consumer therefore shall immediately hereafter, or as soon as practicable designate to the Water Company the Four Hundred Fifty (450) acres of said land of the Consumer, and also such excess above Four Hundred Fifty (450) acres up to the maximum of Nine Hundred Ninety-Nine (999) acres in all of Consumer's said land to be so water-stocked, and Consumer shall acquire as and when such designation or designations are made, the proper certificates of stock containing the description of the land to which such stock is to be appurtenant; provided, however, that after XXXXX years from the date hereof no additional land of the Consumer shall be water-stocked without the written consent of the Water Company first obtained."

Certainly, after reading these provisions, it cannot be doubted that the two matters—stock and water—were essentially "parts of substantially one transaction". Other circumstances are equally compelling. The testimony of both plaintiffs indicates clearly that the primary consideration was the securing of water for their lands. Plaintiff Upphoff testified as follows:

"Q. As a matter of fact the only thing you were interested in was the water, isn't that a fact? A. Yes.

"Q. That is all your mother was interested in, wasn't it? A. Yes."

The record can bear no reasonable construction other than that the stock contract would never have been executed unless the agreement to purchase water was also made. This question was presented, in a modified form to the Supreme Court in a companion case to Western Canal Company v. Railroad Commission (above),—Carlson v. Railroad Commission, 216 Cal. 653, 15 P.2d 859, where it is said: "The petitioners in this proceeding are stockholders and purchasers of stock of the Western Canal Company. They seek, by writ of review, an annulment of the order of the Railroad Commission considered in the above-mentioned case, upon all the grounds stated therein, and upon the additional ground that they have obtained or are obtaining their stock in said Western Canal Company at a cost to them in excess of $500,000, in order to obtain a supply of water for irrigating purposes at cost, and, if the order of the Railroad Commission is permitted to stand, it will wholly nullify said investment and will compel these petitioners to pay rates far in excess of the actual cost of service; that the properties of the Western Canal Company are extremely valuable, and the rates which would be required to earn a reasonable return upon the fair value thereof would far exceed the present cost of petitioners of their required irrigation service, plus any interest on their investment which they might reasonably expect to receive as stockholders; that therefore said order takes from them their private property for public use without prior compensation therefor and impairs the obligation of the contracts between them and the Western Canal Company. In its opinion and order, the Railroad Commission had in mind the above contention and considered the inequality of petitioner's position as large investors in the stock of the canal company should the commission fix a rate for water use applicable to stockholders and nonstockholders alike. But the commission concluded that this situation could not affect its determination of facts in the proceeding before it, although, in a proceeding for the fixing of rates, it might consider the equities advanced by every consumer. The opinion further stated that, if there were any doubt as to the rights of petitioners as stockholders to share in the profits of the utility's operations, that matter was for the civil courts to determine, but that, if equity required an adjustment of rates to compensate for their contribution to capital, the commission would, no doubt, be empowered to make such an adjustment. Live Oak Water Users' Ass'n v. Railroad Commission, 192 Cal. 132, 219 P. 65."

In the case of Albin v. Railroad Commission, 216 Cal. 655, 15 P.2d 860, 861, another companion case to the Western Canal Company case, the court says, in answer to the contention of a landowner, that he had invested large sums of money (as stockholders) in Western Canal Company: "At most these stockholders have paid their money to get a fixed amount of water at a fixed rate for use upon their lands. Under the order of the commission, they will get the needed amount at a regulated cost. Whether they will gain or lose by the process does not appear, but there is no reason to suspect that they will fare worse. Moreover, they can be heard at the rate-making hearing when their right to preferential consideration can be considered. Again, failure to ask a rehearing of the Commission's order before it became effective precludes relief in this court."

[16-18] Obviously, unless the water contract and the stock contract together constituted one indivisible transaction, that is, unless the stock purchase was part of and incidental to the contract for water service, the railroad commission and the Supreme Court could not have sanctioned such an adjustment by which plaintiffs were compensated by special concessions with respect to water rates and service for the contributions made in payment for

the shares alleged to have been invalid. If, in fact (as appellants sought to prove), by purchasing the stock, plaintiffs received something more than the stock itself, to-wit, water at a rate under its fair market value, defendants were entitled to make such proof in connection with the damages which plaintiffs claimed. We believe, in all fairness and justice, that the entire transaction should have been revealed, and that the evidence on this phase of the case should not have been thus narrowly confined to only that which would benefit plaintiffs. Thus, in computing the damages if the reasonable value of the water was $9 per acre, and by virtue of the stock purchase plaintiffs purchased it at $6 per acre, the benefit of a reduction amount to $3 per acre should be set off against the amount paid for stock. Evidence of such reasonable value would be charges for similar service under similar conditions.

Contending that the rule under discussion is not applicable, respondents urged that the contracts are "separable and severable because of the nature of the transaction. The stock purchase contract being void, they (plaintiffs) got nothing under it, and the consideration wholly failed." But appellants overlook the fact that what they actually received under the stock contract was an issue—and a very vital one—in the case, and the proffered evidence bore directly upon that issue. The record as it now stands shows clearly that the consideration for the stock was, in part at least, based on water service. True, the representation by appellants, to the effect that respondents could not get water unless they purchased stock, was fraudulent, but the fact remains that (taking the proffered evidence as true) respondents got something more from appellants than a mere certificate of stock. They received irrigation water at a reduced rate, considerably below the reasonable value of such water.

[19] It is contended that the rule does not apply because the parties to the contracts are not the same. It appears that the water service contract is executed by an additional party, Hugo Upphoff, whose name was not upon the stock contracts. It also appears that this party was the husband of one of the plaintiffs, Vera E. Upphoff. It further appears from the findings that the land to be irrigated was owned by plaintiffs alone, and it would follow that the record shows that Hugo Upphoff had no interest whatever in the lands to be irrigated under said contract. It is obvious that the name of the husband upon the water contract was entirely superfluous. Appellants became bound to furnish water to landowners only upon lands described in the pleadings and findings, and the operation of the rule should not, and cannot, be suspended by such a highly technical contention. The contracts substantially comply with the requirement of the code section (1642, Civ. Code), to the effect that the several contracts must be between the same parties. No authorities are cited by respondents to uphold their contention.

[20] It is unnecessary to discuss other objections made by respondents to the application of the rule. None of them meets the obvious conclusion to be reached from the record, to the effect that all of the contracts in reality constituted but one transaction. It is the first and primary duty of the courts to see that substantial justice is done. To permit only that part of a transaction to be shown which enhances the damages, and to refuse to admit in evidence another part of the same transaction which (on its face) would materially reduce such damages, would certainly not promote the ends of justice. We do not wish to be understood as holding that the proffered evidence is incontrovertible, but we do hold that it was the duty of the trial court to hear and consider the proffered evidence, and that the ruling of the court was prejudicial to such an extent as to require the issue of damages to be retried.

A matter which will arise on a further hearing concerns the finding to the effect that plaintiffs received nothing whatever of value because of the making of the stock purchase contracts, and that all payments upon the same were made without any consideration whatever. If upon a retrial of the issue of damages the trial court should conclude that irrigation water was delivered to plaintiffs at a rate below the reasonable value thereof, the court is directed to amend the finding mentioned above, by setting forth that there was something of value received by plaintiffs, and that there was a consideration for such contracts. This amendment in no manner affects the cause of action, and would only be made with a view to conform to our ruling on the matter of the several contracts being in fact but one transaction. The findings should also be amended to set forth the water contract, and the conclusions of law should be amended to show that all the contracts came within the provisions of section 1642 of the Civil Code. If other amendments to the findings and conclusions of law appear to the trial court to be necessary in order to conform to this opinion, they are directed to be made.

[21] Taking up the appeal by plaintiffs, it is contended that the trial court erred in the manner of allowing interest. Under the judgment, interest at the legal rate was allowed upon the principal amount paid under the stock purchase contracts. It is contended that the court should also have allowed interest upon the interest paid under said contracts, from the date of payment of each instalment of interest. We believe the contention is correct. There is no logical distinction to be drawn between interest due on principal payments and interest payments made on such principal. Both amounts are damages which are equally certain of ascertainment, and interest should be allowed on each under the provisions of section 3287 of the Civil Code. This error can be corrected under further proceedings, as it relates to the issue of damages only.

Numerous other contentions are advanced by appellants, but we find them to be without substantial merit. The findings cover all the material issues, and have ample support in the evidence, with the exception of those relating to damages.

It is therefore ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial, upon the sole issue of the amount of damages due in accordance with the views herein expressed. Each party to pay his own costs on appeal.

33 Cal.App.2d 317

## PEOPLE v. KRUG et al.

Cr. 3188.

District Court of Appeal, Second District, Division 2, California.

June 12, 1939.

Rehearing Denied June 21, 1939.

Hearing Denied July 11, 1939.

**1. Criminal law ⇔998**

Evidence at hearing on defendant's motion to set aside judgment sentencing him to state prison on plea of guilty of second degree burglary *held* to show that no assurance was given him that court would sentence him merely to county jail and that he knew sentence was entirely up to court if he plead guilty, so as to require affirmance of order denying motion.

**2. Criminal law ⇔997**

Defendant sentenced to state prison on plea of guilty of second degree burglary is not entitled to vacation of judgment on ground that he was assured that court would sentence him merely to county jail, in absence of anything in affidavit supporting motion or defendant's testimony at hearing thereon to indicate that he was not guilty of such offense or that trial would result in acquittal.

**3. Criminal law ⇔997**

The remedy of vacation of judgment on plea of guilty induced by false promises of leniency is not designed to enable guilty to escape punishment, but to purify administration of justice, and may be utilized only on strong and convincing showing of deprivation of legal rights by extrinsic causes.

* * *

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Francis Krug and Vahan Rejebian plead guilty of second degree burglary, and from an order denying defendant Rejebian's motion to vacate or modify a judgment denying probation and sentencing him to state prison, he appeals.

Affirmed.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

PER CURIAM.

The following opinion was prepared by the late Mr. Presiding Justice Crail and is adopted and published as the opinion of the court:

The defendant and a codefendant were charged with the crime of burglary, to which they pleaded "not guilty". Two months later each defendant changed his plea of "not guilty" to "guilty of second degree burglary" and filed applications for probation. Probation was denied and the defendant was sentenced to San Quentin. Thereafter the defendant moved to vacate or modify the judgment, which was denied, and it is from this order the appeal is taken.

[1] In support of his motion the defendant filed an affidavit in which he said that prior to the time of pleading "guilty" he had been promised a jail sentence by certain officers of the police force, and in which he further said, "We talked over our affairs and the recoveries I had and was making, and many times I asked Officers Quinn and Curtis if I was going to get a jail sentence and they said yes. At this time one of my attorneys was Mr. A. Benjamin. He was present at some of these meetings with Officers Quinn and Curtis, when these officers promised to explain to the district attorney and the court about my helping to make these recoveries, and as well, that I had been promised a County Jail sentence. At the time my plea was entered I did so because I was relying on this particular advice and would not have done so had I not been promised that I would get a jail sentence with or without probation. At many and at different times and at the last, I did believe that this was the sentence I would receive and I would not have made the plea that I did make had I not relied on these promises, * * *."

The defendant relies upon the case of People v. Schwarz, 201 Cal. 309, 314, 257 P. 71, 73, and the cases therein cited, and in that case the court said: "It may be stated from the above authorities that it is now well settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before a plea of any kind was entered." It should be noted, however, that the court in the same paragraph also says, "that this exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes."

At the hearing of the motion to set aside the judgment the following proceedings, among others, were had:

"The Court: On October 28, 1938, a motion was made to reopen the probation hearing, the defendant Rejebian was in court with his counsel, John E. Glover, the People were represented by Charles H. Matthews, Deputy District Attorney, at which time Mr. Glover made the motion to reopen the probation hearing on the grounds stated in his written motion, and as part of that hearing that took place at that time the court made this statement: 'Well, in other words, you want this record to show that before this defendant was brought into court, certain promises were made to him by certain police officers who were attempting to usurp the powers of the court; is that correct?'

"Mr. Glover: 'No, not at all, your Honor. I expect to prove at this time, if the court will allow me to put testimony in evidence, that officers saw the defendant at the time he was in jail, at which time he was under $20,000.00 bail; that they saw the defendant in accordance with instructions and authority from their superior officer in the police department. That the promises held out to the defendant were subject, naturally, to the approval of the court, and the defendant was informed that the court didn't have to or would not necessarily follow the recommendations or the promises made; but nevertheless that the court would be apprised of the promises that were made. However, I stated, with the distinct understanding that the court could reject them or accept them at his own pleasure.'

"That statement came out at the former hearing.

"Mr. Cooper: Thank you. Are there any questions that your Honor desires to ask of this defendant now, sir?

"By the Court: Q. Mr. Glover at no time told you you would get a County Jail sentence as the result of the conference held in my office? [which was before the defendant pleaded guilty]. A. No, he did not, Mr. Glover did not.

"Q. He was the last person who talked to you after that conference, wasn't he? You never talked to any of the police officers before the time of entering the plea? A. I talked to the police officers.

"Q. After you talked to Mr. Glover that morning? A. No, not that morning, no.

"Q. And Mr. Glover told you distinctly at that time it was entirely up to the court what sentence he wanted to give, isn't that right? A. Mr. Glover told me that, yes, sir.

"Q. With that in mind, you entered your plea of guilty? A. I asked him then, the question, very distinctly, if I—I said, 'If I plead guilty, the court can send me to the penitentiary'; he said, 'That will all be straightened out probably later', he said, 'so, at this time, better probably plead guilty'.

"Q. When did he make that statement now? A. When I talked to him in the hallway.

"Q. Outside the court? A. This gate right here.

"Q. Don't you recall he just had an opportunity to say just a couple of words to you, I followed him right out of the chambers, with the police officers? A. I talked with him very shortly, a very few words.

"Q. Do you want to tell this court he made that statement? If you do, I will subpoena him. A. He never promised me anything. I asked him if he understood it, and he said it will be—

"Q. Mr. Glover made that statement, inferring there was a deal made with this court? A. No, no deal of any kind.

"Q. Let's get that straight right now. You tell us the statement Mr. Glover made to you. A. Mr. Glover merely told me that—

"Q. Take your time, and think, and don't have any question about it. A. 'You are going to plead guilty to the charge,' and I said, 'By pleading guilty, I will have no assurance what will happen, have I?' He said, 'No, you have no assurance' and he said 'Just plead guilty, and say nothing, and it will be all there is to it right now, and apply for probation.' You see I followed his advice, and pled guilty, when you asked me if there was—if anyone had promised anything, on his advice, I said no.

"Q. There was no assurance given you at any time by Mr. Glover or any inference given you by anyone that the court would ever send you to the County Jail? * * * A. Not in the courtroom, after I left here.

"The Court: In fact, you knew very well, at the time you entered the plea of guilty, it was entirely up to this court as to what sentence you were going to get, isn't that right? A. That was the advice of my attorney, yes.

"Q. You knew that to be the fact, didn't you? A. Yes, your Honor."

It thus appears obvious that at the time the defendant changed his plea from "not guilty" to "guilty" that there was no assurance given the defendant or any inference given to him that the court would sentence the defendant merely to the county jail, and that he knew that if he entered a plea of "guilty" it was entirely up to the court what sentence he was going to get, and the order must be affirmed.

[2, 3] Another thing worthy of note is that there is not a word in the defendant's affidavit nor in the defendant's testimony before the court to indicate that defendant was not guilty of the charge to which he pleaded guilty or that a trial would result in his acquittal. "The exceptional remedy above referred to was not designed to enable the guilty to escape punishment, but to purify and keep pure the administration of justice, and the same may be utilized only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489, 491.

The order is affirmed.

33 Cal.App.2d 190

## DAVIS et al. v. CITY OF SAN DIEGO et al.

Civ. 12284.

District Court of Appeal, Second District, Division 2, California.

June 5, 1939.

**1. Licenses ⚿35**
**Pleading ⚿8(2), 16, 22**

A complaint, in suit to enjoin enforcement of ordinance providing for licensing and regulating certain professions and businesses, which alleged that plaintiff was engaged in personal property loan business and that under ordinance it was unlawful to engage therein without a license, that ordinance conflicted with provisions of Personal Property Brokers Act, and that ordinance, although enacted for regulatory purposes, was enforced for revenue only, stated a cause of action and was not demurrable as pleading conclusions of law, hearsay statements, and irrelevant and self-serving matter. Gen.Laws Supp.1933, Act 5825.

**2. Pleading ⚿16**

Pleadings are intended to be self-serving and pleadings based upon hearsay are expressly authorized.

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Suit by A. Leaman Davis, doing business under the fictitious name of the United States Finance Company, W. R. Nimock and another, partners under the firm name and style of the Pacific Auto Finance Company, and all others similarly situated, against the City of San Diego (a municipal corporation), George Sears, as Chief of Police of the City of San Diego (a municipal corporation), W. C. Crandall and others, as members of the Common Council of the City of San Diego (a municipal corporation), and John Doe and Richard Roe, as police officers of said City of San Diego (a municipal corporation), and P. J. Benbough, as Mayor of the City of San Diego (a municipal corporation), for an injunction restraining the city from enforcing an ordinance providing for licensing and regulating certain businesses and occupations. From a judgment after the sustaining of a demurrer without leave to amend, plaintiffs appeal.

Reversed.

Hillyer & Boldman and Bertrand L. Comparet, all of San Diego, for appellants.

Dayton L. Ault, City Atty., and James J. Breckenridge, Deputy City Atty., both of San Diego, for respondents.

The following opinion was prepared by the late Mr. Presiding Justice CRAIL and is adopted and published as the opinion of the court:

PER CURIAM.

This is an appeal from a judgment after the sustaining of a demurrer without leave to amend. The question is: Did the complaint state a cause of action?

The complaint alleges (boiled down) that the plaintiff is engaged in the personal property loan business in San Diego; that on or about the 26th day of May, 1936, the common council of the defendant city adopted and enacted ordinance No. 915 (new series), and that said ordinance is entitled, "An Ordinance providing for licensing and regulating the carrying on of certain professions, business, trades, callings and occupations in the City of San Diego," etc.; that under the ordinance it is unlawful to engage in the businesses designated therein without first having secured a license; that under said ordinance the chief of police is required to detail at least two police officers to act as license inspectors and that it is the duty of the inspectors to investigate and report on all matters of licenses applied for; that upon the contents of the report of the license inspector the chief of police may grant or deny the application; that upon demand each applicant must furnish his fingerprints and photograph to the chief of police; that personal property brokers are required by section 73 of the ordinance to pay $100 per year for a license to do business; that anyone violating the ordinance shall be deemed guilty of a misdemeanor and subject to a fine of $500 or imprisonment in the city or county jail for a period of six months or both such fine and imprisonment; "8. That the said Section 73 of said Ordinance is unconstitutional, invalid and void, and in direct conflict with and repugnant to the Personal Property Brokers Act [Gen.Laws Supp. 1933, Act 5825] as enacted by the legislature of the State of California now in full force and effect. 9. That the said Section 73 of the City Ordinance is regulatory; that it is a reenactment of similar sections in previous ordinances; that the Common Council first enacted said section about ten years ago at the request of the personal property brokers then doing business in San Diego; that the purpose of the original ordinance was to provide police regulation to prevent irresponsible and nonresident persons from engaging in said business in San Diego except under police supervision; that each reenactment of the said section and the present Section 73 of Ordinance 915 (New Series) was enacted by the City Council for regulatory purposes and for no other purpose. 10. That notwithstanding said Section 73 of said Ordinance was enacted for regulatory purposes, it is now the intent, purpose and determination of the defendants to enforce Section 73 of the said Ordinance *as a license for revenue only;* that no right exists under the said Ordinance by which defendants may so enforce Section 73 thereof." The complaint prays for an injunction restraining the city from enforcing the ordinance against the plaintiff.

The defendant seems to admit the plaintiff's contention and therefore we assume it to be true—that if the ordinance was enacted by the city council for regulatory purposes and for no other purpose, it has been wholly superseded by the Personal Property Brokers Act as enacted by the legislature of the state of California and now in full force and effect.

It is the contention of the defendant that, "These allegations [paragraph 9, which we have set out in full above] were not only conclusions of law, but likewise were mere hearsay statements, irrelevant and self-serving declarations and, as such tendered no issue."

In the case of County of Plumas v. Wheeler, 149 Cal. 758, 763, 767, 87 P. 909, a situation much like the instant case was before the Supreme Court. The board of supervisors of that county passed an ordinance ostensibly for the purpose of regulating the business of grazing sheep, but it was attacked on the ground that the license fee charged was greatly in excess of the amount necessary to cover the cost of regulation, and that the ordinance, therefore, although ostensibly for regulation, was actually being enforced for purposes of revenue. The court held that the reasonableness of the fee for regulatory purposes (and therefore whether the actual purpose was regulation or revenue) was a question of fact to be determined by a jury.

Under somewhat similar circumstances an ordinance of Lassen county requiring the payment of a license fee ostensibly for purposes of regulation came before the court in Re McCoy, 10 Cal.App. 116, 101 P. 419, 426. Again the ordinance was attacked on the ground that "the purpose of the ordinance and license tax is revenue and not regulation". The evidence came up on habeas corpus, and the District Court of Appeal ordered evidence to be taken before the referee, and the court said: "In the sense in which the term 'purpose' is used in the act, evidence is admissible which would tend to show that revenue, and not regulation, was the object or end to be attained, and also as bearing upon the necessity for and extent and character of the regulation required to be given the business. The court will consider the 'circumstances in the light of existing conditions.' In re Smith, 143 Cal. 368, 77 P. 180." And the court goes on to list many different circumstances which might be brought in evidence and from which the court would judge the actual, rather than the ostensible, purpose of the legislation. See, also, People v. Ventura Refining Co., 204 Cal. 286, 291, 268 P. 347, 283 P. 60; Coulter v. Pool, 187 Cal. 181, 185, 201 P. 120; Sales v. Stewart, 134 Cal.App. 661, 664, 26 P.2d 44; Crowe v. Boyle, 184 Cal. 117, 125, 193 P. 111; In re Bock, 125 Cal.App. 375, 381, 13 P.2d 836.

[1,2] The defendant's contention that the plaintiff's allegations that the license tax was imposed for the purpose of regulation are "conclusions of law, hearsay statements, irrelevant matter and self-serving declarations and, as such, tender no issue" is without merit. The objection might be a good one to certain kinds of evidence. Pleadings are meant to be self-serving and pleadings based upon hearsay are expressly authorized. The allegations in question are neither irrelevant nor conclusions of law—they are allegations of ultimate fact. In our view the complaint states a cause of action, and the judgment should be reversed.

Judgment reversed.

33 Cal.App.2d 336

## WEDEMEYER v. ELMER.

Civ. 10840.

District Court of Appeal, First District, Division 2, California.

June 13, 1939.

**1. Husband and wife ⚿264**

Where income from wife's separate property during her lifetime was sufficient to cover expenses on property and payments on mortgage to which property was subject, and there was no specific agreement to transmute wife's property into community property by making payments on mortgage out of community property and husband's separate property, agreement to transmute wife's separate property into community property could not be implied from payment of the mortgage with community funds or with separate funds of the husband.

**2. Husband and wife ⚿264**

Where wife acquired property subject to mortgage prior to marriage, fact that husband joined in executing renewal notes and mortgages on the property did not affect rights of the parties as respects separate property of the wife.

Appeal from Superior Court, City and County of San Francisco; Albert F. Ross, Judge.

Action to quiet title by William F. Wedemeyer against Kate Elmer, as executrix of the estate of Georgie Wedemeyer, also known as Ida Wedemeyer, and also known as Ida Corr. From a judgment for the plaintiff, defendant appeals.

Reversed in part and in part affirmed.

Walter H. Duane, of San Francisco, for appellant.

O'Brien, Dibert & Acton and Lillian M. Wollitz, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, the surviving husband of Georgie Wedemeyer, deceased, brought this action against defendant, as executrix, seeking to quiet title to an undivided one-half interest in two parcels of real property. One of said parcels was located in the city and county of San Francisco and the other was located in the county of Santa Cruz. It was the claim of plaintiff that both parcels were the community property of plaintiff and the deceased. The trial court found in favor of plaintiff's claim and entered judgment quieting plaintiff's title to an undivided one-half interest in both parcels. Defendant appeals from said judgment.

It was conceded at all times by defendant that the Santa Cruz property was community property and while this appeal was taken from the entire judgment, no claim is here made that the judgment is erroneous in so far as it affects said Santa Cruz property. The controversy is therefore narrowed to the attack made upon the portion of the judgment relating to the San Francisco property.

Plaintiff and the deceased were married in 1912 and lived happily together on the San Francisco property from that time until the death of the deceased in 1936. Said property consisted of a lot improved with a building consisting of four flats. Prior to the time of the marriage, deceased had purchased said lot and had caused the improvements to be erected thereon. The property was subject to a mortgage in the sum of $6,000 at the time of the marriage. Plaintiff and deceased lived in one of said flats and deceased collected the rentals from the other flats during the entire period of her married life. The total rentals from the other flats averaged from $60 to $70 per month throughout that entire period. At the time of the death of the deceased, the unpaid balance on the mortgage amounted to $1,975.

Plaintiff was a fireman in the San Francisco Fire Department and was earning $120 per month at the time of the marriage. He was so employed until 1930 during which time his earnings had gradually increased to $200 per month. He was retired in 1930 and thereafter received a monthly pension of $100 per month.

Plaintiff testified that all of his earnings were turned over to his wife and that said earnings, together with the rentals from said San Francisco property, were kept in a bank account in his wife's name. He further testified that the proceeds from the sale of certain property which he had inherited, amounting to $2,800 on one sale and $1,000 on another sale, were likewise turned over to his wife and placed in the same bank account. The funds in said account were used to pay living expenses, to acquire two other parcels of real estate consisting of the Santa Cruz property above mentioned and another parcel located in San Francisco, and for the payment of expenses in connection with the parcel in controversy including payments of interest and principal on the mortgage. It is apparently conceded by all concerned that the two parcels acquired during the married life of the parties were community property. However, the second San Francisco parcel is not involved in this litigation. Plaintiff did not disclose the amount of the purchase price of either parcel which was acquired during the married life of the parties.

The San Francisco property which is the subject of this controversy was indisputably the separate property of the deceased at the time of her marriage to plaintiff. The sole question on this appeal is whether there is any evidence to sustain the trial court's finding that said property was the community property of the spouses at the time of the death of the deceased. Defendant contends that the evidence was insufficient for that purpose and, in our opinion, this contention must be sustained.

[1] It appears from the evidence that the proceeds of said property, over the period of twenty-four years, were more than ample to pay all of the expenditures connected with said property including the payments of interest and principal, by which the mortgage thereon was reduced from $6,000 to $1,975. It is apparently plaintiff's theory, however, that community property and separate property of plaintiff were used for the purpose of making the payments on said mortgage, in whole or in part, and that therefore the said property was transmuted into community property. Assuming that there was sufficient evidence to support the foregoing premise, we cannot agree with plaintiff's conclusion. There was no evidence of any specific agreement to transmute said separate property of the wife into community property and such an agreement may not be implied from the mere payment of the mortgage thereon with community funds or with separate funds of the husband. Holtze v. Holtze, 2 Cal.2d 566, 42 P.2d 323; Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988; Smith v. Smith, 47 Cal.App. 650, 191 P. 60; Carlson v. Carlson, 10 Cal.App. 300, 101 P. 923.

Plaintiff cites several cases in which the property in question was acquired by the wife after marriage. In these cases the question involved was that of the intention of the parties with respect to the character of the property at the time of acquisition. Such cases are obviously not in point. Plaintiff further cites certain cases in which community funds were expended upon property which was claimed to be the separate property of the husband. But the rules applicable in such cases are different from the rules applicable where community funds are expended upon the separate property of the wife. Dunn v. Mullan, supra; Callnon v. Callnon, supra; Provost v. Provost, 102 Cal.App. 775, 283 P. 842.

[2] Plaintiff further stresses the fact that he joined from time to time in executing renewal notes and mortgages on said property. As the property was admittedly acquired by the wife as her separate property before her marriage to plaintiff, the joining by plaintiff in the execution of said renewal notes and mortgages could not affect the rights of the parties. Martin v. Martin, 52 Cal. 235.

The judgment is reversed in so far as it relates to the property located in the city and county of San Francisco, being the property designated in said judgment as "Parcel No. 1", and said judgment is affirmed in so far as it relates to the property located in the county of Santa Cruz, being the property designated in said judgment as "Parcel No. 2". Defendant will recover costs on appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 340

## CRAEMER v. NORTON REALTY CO.

Civ. 12211.

District Court of Appeal, Second District, Division 2, California.

June 13, 1939.

**Mortgages ⟾330**

Where note secured by trust deed was executed prior to enactment of statute barring right to deficiency on failure to record notice of breach and election to sell under trust deed one year before date of sale, plaintiff who recorded notice of breach and election to sell under trust deed three months before date of sale was not precluded from recovering deficiency remaining after trustee's sale by failure to comply with statute, since statute was not intended to have retroactive effect. Civ.Code, § 2924½.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Justus F. Craemer, as building and loan commissioner of the state of California, in the liquidation of North America Building-Loan Association, a corporation, against Norton Realty Company, a California corporation, to recover deficiency remaining after trustee's sale of realty, which had been made security under terms of a note and trust deed. From an order striking defendant's answer and a judgment for the plaintiff, defendant appeals.

Judgment affirmed and appeal from order striking defendant's answer dismissed.

Mitchel S. Meyberg, of Los Angeles, for appellant.

Robert Lee Collins, of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

Plaintiff commenced this action to recover a judgment for a deficiency remaining after a trustee's sale of real property which had been made security under the terms of a promissory note and trust deed. The trial court granted plaintiff's motion to strike defendant's answer and rendered judgment for plaintiff. Defendant appeals from the judgment and from the order striking the answer.

The note and trust deed in question were dated November 8, 1929. Defendant became delinquent in its payments and on April 28, 1938, plaintiff exercised the option given in the note and trust deed and declared the full amount of the indebtedness immediately due and payable. Notice of default and election to sell was recorded on May 2, 1938, and after due publication of notice the property secured by the deed of trust was on August 8, 1938, sold at public auction by the trustee. It is alleged in the answer that plaintiff and the trustee failed to record notice of breach and election to sell one year before the date of the sale, as provided in section 2924½ of the Civil Code.

Defendant concedes that the Supreme Court of California, decided the point involved adversely to his contention in Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712, wherein it was held that the application of the provisions of section 2924½, enacted in the year 1933, to deeds of trust executed before the effective date of the statute would be violative of the constitutional inhibition against the impairment of the obligation of a contract since under the statute in force at the time of the execution of the note and trust deed a sale could be made after notice of only three months. Defendant argues, however, that the decision of the Supreme Court of the United States in Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Company, 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886, a case which called for the construction of the statutes of North Carolina, compels a reversal of the decision in Brown v. Ferdon, supra. The same contention was made in Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609, where the court carefully reviewed the authorities and the statutes of North Carolina and of California and held that the rule of Brown v. Ferdon, supra, should be followed. The same conclusion was reached in Bank of American National Trust and Savings Assoc. v. Burg Bros., Cal.App., 88 P.2d 196, 197, wherein Mr. Presiding Justice Nourse, speaking for the court, after referring with approval to the discussion and conclusions of Mr. Justice Haines in the Birkhofer v. Krumm case, added the additional point that the issue in the Birkhofer case "might well rest upon the firmer foundation that the legislature did not intend that the statute [sec. 2924½] should operate retroactively". On the authority of these decisions the judgment must be affirmed.

The judgment is affirmed. The appeal from the order striking defendant's answer is dismissed.

I concur: McCOMB, J.

33 Cal.App.2d 349

## KINDIG v. PALOS VERDES HOMES ASS'N et al.

Civ. 12094.

District Court of Appeal, Second District, Division 2, California.

June 14, 1939.

Hearing Denied Aug. 10, 1939.

**1. Trusts 🔑171**

Under trust indenture giving corporation organized pursuant thereto sole authority to fix amount of annual maintenance assessment on each lot in certain tract, it was duty of corporation's board of directors to adopt regulation fixing assessment on both land and improvements thereon each year.

**2. Property 🔑4**

"Real property" includes land and whatever is erected or growing thereon or affixed thereto. Civ.Code, § 14, subd. 2; § 658.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

**3. Trusts 🔑172**

Corporation directors' regulation, fixing annual maintenance assessment on each lot in certain tract at stated sum on each $100 of assessed valuation, as established by county assessor pursuant to trust indenture, was not valid as in compliance with alternate plan, referred to in provision thereof for assessment "in accordance with some other legal and equitable plan to be adopted by the board of directors."

**4. Estoppel 🔑90(6)**

A member of corporation, authorized by trust indenture to fix amount of annual maintenance assessment on each lot in certain tract, was not estopped to object to corporation directors' regulation, fixing amounts of assessments on lots exclusive of improvements, by failure to object to like previous assessments, in absence of showing that directors were prejudiced by such failure.

**5. Appeal and error 🔑123**

An appeal does not lie from minute order or other memorandum clearly intended merely to authorize issuance of another written order or judgment, so that minute order, which was mere preliminary entry authorizing subsequent judgment directing issuance of writ of mandate, was not appealable. Code Civ.Proc. §§ 577, 963, 1003.

**6. Admiralty 🔑88**
**Courts 🔑202(4)**
**Equity 🔑415**

A "decree" is judgment of equity court, probate court, or admiralty court.

[Ed. Note.—For other definitions of "Decree," see Words & Phrases.]

**7. Mandamus 🔑187(1)**

An appeal does not lie from a writ, such as a writ of mandate. Code Civ.Proc. § 17, subd. 6; § 963.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Proceeding by W. H. Kindig, on behalf of himself and all others similarly situated, for a writ of mandate directing the Palos Verdes Homes Association, a corporation, and others, constituting a majority of such corporation's board of directors, to include improvements in maintenance assessments on realty located in Palos Verdes Estates. From a judgment granting the writ and from a minute order and the writ of mandate, defendants appeal.

Appeals from minute order and writ dismissed, and judgment affirmed.

Clyde F. Murphy, of Los Angeles, for appellants.

Willett & Willett and Horace W. Danforth, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment directing the issuance of a writ of mandate to defendants after the trial court overruled their demurrer to a petition requesting that defendants be required to include in an assessment improvements upon real property located in Palos Verdes Estates, defendants appeal. There are also purported appeals from the minute order and writ of mandate.

These are the essential facts:

Petitioner is the owner of several lots in Palos Verdes Estates and as such is a member of defendant Palos Verdes Homes Association, a corporation. The defendants, aside from the corporation, are a majority of the members of its board of directors.

In 1921, a trust indenture, known as the Palos Verdes Project, which covered the property which is the subject of the present litigation, was executed and recorded. This trust indenture provided for the organization of the Palos Verdes Homes Association, article VI, sec. 4H(1) of said trust indenture, reading in part as follows:

"* * * That Palos Verdes Homes Association shall have sole authority:

"(a) To fix and establish annually the amount of such annual charge or assessment on each and every lot or parcel of said real property or any interest therein, subject to such continuous lien which shall be based on the assessed valuation of said real property as established by the County Assessor of Los Angeles County, for the then current fiscal year at a rate never in any one year in excess of the total annual tax rate established for all purposes for the then current fiscal year by the City Council for the Old City of Los Angeles, or in accordance with some other legal and equitable plan to be adopted by the Board of Directors of Palos Verdes Homes Association, provided that the total amount of said charge or assessment for the whole subdivision under such alternate plan shall never exceed the largest total amount that could have been raised under said first named plan."

Thereafter, pursuant to the trust indenture, defendant corporation was duly organized and its by-laws provided in article XVIII, sections 1 and 5 as follows:

"Section 1. The Director of Finance shall have direct supervision over the Department of Finance and the administration of the financial affairs of the corporation, including the keeping of accounts and financial records; the levy, assessment and collection of charges or assessments, and other fees and revenues (except as otherwise provided herein); the custody and disbursement of corporation funds and moneys and the deposit of the same in such bank or banks as the Board of Directors shall designate; the control over expenditures; and such other duties as the Board of Directors may, by regulation, provide."

"Section 5. On or before the 15th day of October, in each year the Board of Directors shall, by regulation, fix and establish the amount of the annual maintenance charge or assessment mentioned in Article I hereof, necessary to meet the appropriations made (less the estimated amount of revenue from other sources)."

September 7, 1938, in an endeavor to meet the requirements of article XVIII, section 5, of the by-laws of the corporation, defendant directors adopted a resolution reading in part as follows:

"Regulation No. 66

"Regulation Fixing the Annual Charge or Assessment for the Fiscal Year Beginning July 1st, 1938, on All Property in Palos Verdes Estates Subject to Said Charge or Assessment, Together With Penalties for the Non-Payment Thereof; and Providing for the Collection and Payment Thereof.

"The Board of Directors of Palos Verdes Homes Association ordains as follows:

"Section 1. The Board of Directors of Palos Verdes Homes Association does hereby fix, establish, levy and impose a maintenance charge or assessment for the fiscal year beginning July 1st, 1938, of one dollar and seventy-one cents ($1.71) on each one hundred dollars ($100.00) of assessed valuation, as established by the Assessor of the County of Los Angeles, California, and revised by the Board of Equalization as the official assessment roll of said County for the said fiscal year, on each and every parcel or lot, exclusive of improvements, in that tract of land known as Palos Verdes Estates (being all subdivided land included within the boundaries of Tracts 4400, 6881, 9302 and 9822 of said Los Angeles County, and also that parcel of approximately two (2) acres lying between Palos Verdes Drive East and the Westerly line of said Tract 6881), which are or may be subject to said charge or assessment on account of restrictions, conditions, covenants, liens or charges set forth in Declarations of Restrictions duly filed of record with the County Recorder of said County."

October 13, 1938, the trial court issued a peremptory writ of mandate reading in part as follows:

"Now, therefore, it is hereby ordered that a peremptory writ of mandate in due form of law be issued requiring the board of directors of the defendant Palos Verdes Homes Association, a corporation, and defendants U. B. Bray, Donald Armstrong, J. C. Burks, and E. B. Haggott, who constitute and are a quorum and the controlling majority of the said board of directors, with all convenient speed, but in all events prior to October 15, 1938, wholly to rescind and expunge from the records of the said Palos Verdes Homes Association that certain unlawful and void regulation undertaken to be passed and adopted by the said board of directors of the said defendant corporation on September 7, 1938, which said regulation is now designated and known as 'Regulation 66'; and,

"It is further ordered that in the place and stead of the said 'Regulation 66', the above-named defendant members of the said board of directors shall cause to be adopted, and the said defendant board of directors shall adopt, not later than October 15, 1938, a regulation of assessment, in accordance with the by-laws of said corporation, which regulation, however, shall in terms provide that the charge or assessment fixed, established, levied and imposed thereby shall apply not alone to the assessed valuation of any lands subject to the jurisdiction of the said board of directors, but to the assessed valuation of both such land and all improvements existing in or upon the same, or any lots or parcels thereof, as fixed by the county assessor for Los Angeles county, California, for the fiscal year 1938-39; and,

"It is further ordered that the rate of such assessment or charge as aforesaid shall be such rate as, on said assessed valuation of both such land and the improvements thereon, will realize enough revenue from such assessment or charge, with any other income the actual cash receipt of which is reasonably to be anticipated by the said board of directors during the current fiscal year 1938-39, to meet the requirements of the existing budget, to-wit, $50,620.00; * * *."

These are the questions presented for determination:

*First: Was it the duty of the board of directors of defendant corporation to adopt a regulation prior to the 15th of October of each year, levying an assessment as provided in its by-laws and the trust indenture of Palos Verdes Estates on the land and improvements thereon included in the Palos Verdes Estates?*

*Second: Was regulation No. 66 adopted by defendants valid as being in compliance with the alternate plan referred to in article VI, section 4H(1) of the trust indenture?*

*Third: Was petitioner estopped from objecting to defendants' adopting regulation No. 66, in view of the fact that in previous years he had not objected to the land in Palos Verdes Estates being assessed without the inclusion of the improvements thereon?*

[1, 2] The first question must be answered in the affirmative. Article VI, section 4H(1) of the trust indenture, the provisions of which it was the duty of the board of directors of defendant corporation to enforce, provided that the Palos Verdes Homes Association should have sole authority "To fix and establish annually the amount of such annual charge or assessment on each and every lot or parcel of said *real property* or any interest therein, subject to such continuous lien which shall be based on the assessed valuation of said *real property* as established by the County Assessor of Los Angeles County, for the then current fiscal year at a rate never in any one year in excess of the total annual tax rate established for all purposes for the then current fiscal year by the City Council for the Old City of Los Angeles, * * *." (Italics added.)

It is important to determine what is meant by the phrase *real property* as used in the foregoing by-law. The phrase *real property* includes land and whatever is erected, growing thereon or affixed thereto. City of Los Angeles v. Hughes, 202 Cal. 731, 736, 262 P. 737; 50 Cor.Jur. [1930] 746, sec. 19; sec. 14, subd. 2, sec. 658, Civ. Code.

Applying the foregoing definition to the provisions of the declaration of trust just quoted, it is clear that it was the duty of defendants to adopt a regulation fixing an assessment upon the land and the improvements thereon. This regulation by the by-laws of defendant corporation was required to be adopted prior to the fifteenth day of October each year.

[3] The second question must be answered in the negative. From a reading of regulation No. 66 originally adopted by defendant corporation, it is evident that defendants were not attempting to act under an alternate plan but under the method first described in the declaration of indenture.

[4] The third question must also be answered in the negative. One of the essential elements of estoppel, that the party relying thereon has been prejudiced as a result of another party's acts, is not present in this case, and, therefore, this doctrine has no application. There is a total lack of any showing that defendants or either

of them have been prejudiced in any way by petitioner's failure in previous years to object to the assessment of land without the inclusion of the improvements thereon. Estate of Fassetta, 1½ Cal.App.2d 239, 240, 57 P.2d 1336; Cohen v. Metropolitan Life Insurance Co., Cal.App., 89 P.2d 732.

[5] No appeal lies from a minute order or other memorandum, the clear intent of which is that the court has merely authorized the issuance of another written order or judgment. Bley v. Board of Dental Examiners, 101 Cal.App. 666, 668, 282 P. 19. In the present case the minute order from which the purported appeal is taken was a mere preliminary entry authorizing the subsequent judgment.

The purported appeal from the minute order is dismissed.

A judgment is the final determination of the rights of the parties in an action or proceeding. Sec. 577, Code Civ.Proc.

An order is the direction of a court or judge made or entered in writing and not included in a judgment. Sec. 1003, Code Civ.Proc.

[6] A decree is the judgment of a court of equity, court of probate, or court of admiralty.

[7] A writ is an order or precept in writing, issued by a ministerial officer in the name of the people, or of a court or judicial officer. Code Civ.Proc. § 17, subd. 6.

Section 963 of the Code of Civil Procedure provides that appeals may be taken from judgments, orders, or decrees. It does not provide for an appeal from a writ. Hence, the purported appeal from the writ is dismissed.

For the foregoing reasons the judgment is affirmed.

I concur: WOOD, Acting P. J.

## PAINE v. STATE BAR OF CALIFORNIA.

S. F. 16097.

Supreme Court of California.

June 22, 1939.

Rehearing Granted July 21, 1939.

See 93 P.2d 103.

**1. Attorney and client ⚷41**

The falsity of allegations, contained in petition prepared by attorney for presentation to probate court for compromise of a claim, relating to ownership of instruments evidencing claim and to identity of property involved warranted taking of disciplinary measures against attorney for misleading the court by a false document.

**2. Attorney and client ⚷58**

The suspension for two years of attorney who had misled probate court by means of false allegations in petition for compromise of a claim was proper punishment, notwithstanding that attorney was not shown to have benefited by transaction and no one had been injured thereby.

HOUSER, J., dissenting.

In Bank.

Petition by Willard D. Paine against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that the petitioner be suspended from practice for two years.

Recommendation approved, and petitioner ordered suspended for two years.

Harry J. Bias, W. A. Deans, and Bert B. Snyder, all of Santa Cruz, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a petition to review a recommendation of the board of governors of The State Bar that petitioner be suspended from practice for two years.

[1] The charges against petitioner were the making of false allegations in a petition to the probate court for compromise of a claim, and the procuring of a conveyance of property of the estate to another client without adequate consideration. The facts advanced in support of these charges were as follows: The decedent, Louis C. Rapetta, died intestate in 1934. His son and only heir at law, Clement S. Rapetta, received letters of administration. Petitioner was attorney for the administrator. The major part of the estate consisted of real property in Santa Cruz county, a certain parcel of which was a dairy ranch. This ranch had been mortgaged in 1931 to Harry Von Bargen to secure a two-year note for $3,700. It was past due at the time of the decedent's death.

Shortly after the issuance of letters of administration, Von Bargen called on petitioner to discuss the obligation. Petitioner asserts that the mortgagee demanded payment, though Von Bargen denies this. Petitioner thereafter consulted another client, Mrs. Theresa Mattei, and advised her that the mortgage on the Rapetta property would be a good investment for her. Petitioner then states that he communicated with Von Bargen requesting that he place the note and mortgage in escrow preparatory to Mrs. Mattei's purchase of it; this Von Bargen also denies.

On October 29, 1934, petitioner prepared and filed a petition by the administrator to compromise a claim against the estate. In it he stated that Mrs. Mattei was the holder of the Von Bargen note and mortgage; that she had made demand for payment; and that a compromise had been agreed upon whereby the property would be deeded to her in satisfaction of the mortgage. These statements were not true, for at that time Von Bargen still owned the note and mortgage. The petition also contained a description of the property which included a small parcel not actually included in the mortgaged parcel. The petition was heard, its allegations found true, and the court ordered the execution of a deed of the property described to Mrs. Mattei as prayed. This was done. Some time later, C. D. Stocking, a real estate broker, informed Von Bargen of the sale, and shortly thereafter petitioner paid Von Bargen the money due him from the funds furnished by Mrs. Mattei.

Charges were filed against petitioner before the local administrative committee by Stocking and Von Bargen. The first letter to petitioner by the secretary of the committee, dated July 26, 1935, declares that the substance of the charges was that the court's order was made upon misrepresentations in the petition, and that "attempts of C. D. Stocking to purchase said property as a real estate broker prior to said proceedings in said estate were frustrated by you". After a preliminary hearing the matter was dropped. On October 27, 1937, more than two years later, a notice to show cause was issued by the committee, setting forth the same charges in more detail. Stocking and Von Bargen were again the complainants. Another hearing was had. The report of the committee recites that Stocking "claimed to have been deprived of the privilege of bidding on the property or finding a purchaser therefor, stating that the property was worth much more than the amount of the mortgage". After reviewing the facts in detail, the committee found that petitioner was guilty of the false statements in the petition to compromise, and that the probate court had relied on them in making its order authorizing compromise; and "that the effect of the proceeding was to obtain for Theresa Mattei title to the real property without following the procedure prescribed by law applicable to sales in probate, thus depriving the estate of the safeguards provided by law relating to competitive bidding". The committee concluded that he was guilty of professional misconduct and recommended a "public reproval" by the board of governors. The proceeding came before the board of governors, and that body recommended that petitioner be suspended from practice for a period of two years.

Throughout the proceedings petitioner conceded that, strictly speaking, the statements in the petition concerning the ownership of the note and mortgage were not true, but stated his belief that they were substantially true. He refers vaguely to the transaction as an "escrow" in the sense that the negotiations were going forward under which Mrs. Mattei would pay the money and become the "equitable" owner of the mortgage; and points out further that the facts were all known to the administrator and sole heir, and the transaction was entered into with his approval. With respect to the additional property deeded to Mrs. Mattei, petitioner contends that though it may not have been described in the mortgage it was considered by all parties to be a part of the mortgaged tract, and contained a water right appurtenant thereto. We need not dwell on these defenses because it seems clear that petitioner as a reasonably competent attorney must have known that these statements in the petition were not true. The specific charge of misleading the court by a false document was proved, and discipline was therefore warranted.

[2] There remains for consideration the extent of the disciplinary measures to be taken. Petitioner contends in his defense that the complainants in the proceeding had no legitimate interest in the matter; that the parties in interest made no complaint; that petitioner was not shown to have benefited by the transaction; and that no one suffered any real injury. The local committee found: "Apparently no one has suffered any financial loss by reason of the transaction. The administrator who is also the son and only heir appeared in court at the time of final distribution and stated that he approved all acts of the respondent done in his behalf. C. D. Stocking brought the transaction to his attention, by letter, immediately after the order was made authorizing the compromise, but the communication was referred by Rapetta to the respondent. Rapetta has not made known any complaint which he might have."

Nevertheless, the plan conceived by petitioner was unworthy of an ethical practitioner. Honesty in dealings with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense. We have therefore concluded that the recommendation of the board of governors should be approved.

It is ordered that petitioner be suspended from the practice of law for a period of two years from the date of the filing of this opinion and order.

HOUSER, Justice.

I dissent from the judgment. However, I concur in the conclusion that petitioner should be disciplined in punishment for the commission of the offense of which he was accused. But, notwithstanding that situation, to my mind, the punishment imposed by the judgment is much too severe. Although not suggested as at all indicative of petitioner's innocent intent, or as available to him for the purpose of minimizing the seriousness of his misconduct, but appropriately in mitigation of his punishment, it is not improper to direct attention to the fact that no one who has, or ever had, any direct financial interest in the transaction lost anything by reason of the misstatement which petitioner made to the court. At no time has the only heir to the estate complained of petitioner's conduct in the premises. To the contrary, with full knowledge of the facts in that connection, at all times he has been thoroughly satisfied with the procedure and practice that was adopted and carried into execution by petitioner, and has expressed his approval thereof. Apparently the only persons who gratuitously interested themselves in the prosecution of petitioner were a real estate agent, who perhaps hoped to gain something for himself through a purchase and later sale of the property, and the owner of the mortgage, who may have contemplated not only a possible advantage to be derived from a foreclosure of the mortgage, but also a probable benefit which likely would arise from a deficiency judgment in his favor. Shortly after the representations first had been made to the court, the matter was investigated by the local administrative committee of The State Bar, and thereafter was "dropped". More than two years later, at the instance of the real estate agent and the mortgagee, the question was revived, with the resulting recommendation, as far as the local administrative committee was concerned, that petitioner should be publicly reprimanded. The instant investigation certainly savors of vindictive persecution by disgruntled persons, who could have no public interest in disciplining the petitioner, but rather only in gratifying personal spite. Undeniably, petitioner was guilty of having misconducted himself in his professional capacity; but there is not the slightest indication that he expected to or did either reap any financial reward or derive any advantage to himself by reason of the transaction. His sole object was to serve his client's interest and save the estate from bankruptcy. He is 39 years of age. He has lived and practiced his profession for over 12 years in the community in which the offense was committed. Never before was he "in trouble". As far as the record disclosed, he has always lived an exemplary life. To impose upon him a judgment of two years' suspension from the practice of the law will amount to practical disbarment. At any rate, after such a period has elapsed, it is not improbable that it will or may be extremely difficult for him to reinstate himself either in his own estimation or that of his friends. Unquestionably he made a grave mistake. No matter what his nature, undoubtedly he has suffered intensely. In all probability, he has learned his lesson, and, as a consequence, never again would his conduct properly be subject to adverse criticism. Reduced to its effective element, petitioner's offense consisted in a gross affront to the dignity of the court. No other governmental agency, or person, was in anywise affected. In the future, *the public would be safe.* With reference to passing judgment on petitioner, the members of the board of governors of The State Bar, who made a "recommendation" of two years' suspension of petitioner, were not nearly so well situated as was the local administrative committee, which recommended a "public reprimand". The former saw no witnesses; they heard no oral testimony; nor had they the benefit of evidence of any kind other than the "cold record". In those respects, they were not unlike the members of this court. A "recommendation" does not rise to the dignity of a judgment. It amounts only to a suggestion, but, considering its source, should receive most respectful deference. However, in view of the extremely advantageous position in the premises that was occupied by the several members of the local administrative committee, their conclusion with reference to a proper and fitting punishment to which petitioner should be subjected—if not controlling—is entitled to great weight, and at least should receive the utmost consideration by this court in pronouncing its final judgment. To my mind, considering all the circumstances, this court might perform its entire duty not only by being just, but also by being merciful.

13 Cal.2d 677

## NESBITT, City Clerk, v. BOLZ et al.

S. F. 16252.

Supreme Court of California.

June 22, 1939.

**Municipal corporations 🔑90**

Where two of five members of council of sixth-class city organized under municipal corporations act had been recalled at recall election at which majority of electors voted that council should fill vacancies created, but one of remaining councilmen resigned before vacancies were filled, the two remaining councilmen constituted a "quorum" for purpose of filling vacancies within statute providing that a majority of council should constitute a quorum. St.1883, p. 93; St. 1931, p. 563, as amended; p. 566; St.1933, p. 1319, § 851; pp. 1324, 1325, §§ 859, 861; p. 2117, § 16.

[Ed. Note.—For other definitions of "Quorum," see Words & Phrases.]

In Bank.

Original mandamus proceeding by W. H. Nesbitt, City Clerk of the City of Arcadia, against Emil Bolz and another, Councilmen of the City of Arcadia, to compel the respondents to appoint new members to fill vacancies existing on the city council.

Peremptory writ of mandamus issued.

Burke, Hickson, Burke & Marshall, of Los Angeles, for petitioner.

James C. Bone, of Arcadia, for respondents.

EDMONDS, Justice.

By this proceeding in mandamus petitioner, who is the City Clerk of the City of Arcadia and also a taxpayer and qualified elector thereof, seeks to compel respondents, councilmen of that city, to appoint new members to fill vacancies existing on the city council. A demurrer filed by respondents admits the following facts which appear from the allegations of the petition.

Arcadia is a city of the sixth class organized under the Municipal Corporations Act. Stats.1883, p. 93. As such it has a city council regularly composed of five members. Munic. Corp. Act, supra, sec. 851, St.1933, p. 1319. In May, 1939, by an election held under the Municipal Elective Officers Recall Law (Stats.1931, p. 563, as amended), two members of the council were recalled. A majority of the electors who voted at the recall election also voted that if the recall should prevail, the city council should fill the vacancy or vacancies created. Munic. Elec. Off. Recall Law, supra, sec. 15, St.1931, p. 566. Before the three remaining councilmen could act upon the matter of filling the vacancies, one of them resigned, and respondents, the two others have since refused to meet and appoint new councilmen upon the ground that they do not constitute a quorum of the city council and are without authority to transact any business.

It is petitioner's theory that under section 15 of the Municipal Elective Officers Recall Law, supra, respondents have the power and are under the duty to fill the vacancies on the city council created by the recall election. That section provides: "If the recall should prevail in any case, and a majority of those voting on the question of filling the vacancy or vacancies, as the case may be, favor a special election for that purpose, the same shall be called forthwith * * *. Otherwise the council shall forthwith fill the vacancy or vacancies by appointment." A further provision is: "In the event of a majority of the city council being recalled at one and the same election, said members shall retain their offices until their successors are elected and qualify." Sec. 16, St.1933, p. 2117.

From these provisions it seems clear that when a majority of the council members are recalled, those whom the voters have retired to private life must, nevertheless, continue in office for the purpose of electing their successors, and, possibly transact other municipal business in the meantime. But when fewer than a majority are recalled, as the facts of the present case show, then the only logical conclusion which can be reached is that the legislature intended the council, as composed of either three or four members, to elect persons to fill the vacancies in its membership.

This construction is in harmony with the Municipal Corporations Act, supra, which provides: "At any meeting of the city council a majority of said council shall constitute a quorum for the transaction of business * * *." Sec. 859, St.1933, p. 1324. Although for certain functions, such as the enactment of ordinances, the concurrence of at least three members is required (sec. 861, St. 1933, p. 1325), there is no question but that a council of three members is directed and required to elect the successors of two recalled councilmen and that two of them constitute a quorum for that purpose.

This conclusion is not at variance with the so-called "City Slip" cases such as San Francisco v. Hazen, 5 Cal. 169; McCracken v. San Francisco, 16 Cal. 591, and Pimental v. San Francisco, 21 Cal. 351. These cases involved the interpretation of a charter provision which required the concurrence of "a majority of all the members elected" to the board of aldermen and a board of assistant aldermen for the passage of an ordinance. The ordinance in question had been passed by the board of aldermen, but the board of assistant aldermen, consisting regularly of eight members, voted four in the affirmative and three in the negative, there being one vacancy at the time. It was held that inasmuch as the four assistant aldermen who had voted in the affirmative did not constitute "a majority of all the members *elected*", the ordinances had not been legally passed.

However, a distinction is recognized where, as in this case, the legislative provision does not explicitly require the concurrence of a majority of the members elected. In Board of Commissioners of Salem v. Wachovia Loan & Trust Co. 143 N.C. 110, 55 S.E. 442, 443, the court considered a charter provision which required "a three-fourth vote of the entire board" in order to pass an ordinance borrowing money. One member of the board had resigned, leaving six, and of these only five voted for the passage of such an ordinance. The court held that the charter provision meant three-fourths of the existing membership of the entire board, saying: "Wherever the special provision in such charters contains the words 'entire board elected,' or similar terms, it is invariably held that all the members elected must be taken into account. Dillon on Mun.Corp. § 281. We are unable to find any judicial decision which places the same construction upon the words 'entire board,' when the word 'elected' does not follow." See, also, People v. Wright, 30 Colo. 439, 71 P. 365; State ex rel. Wilson v. Willis, 47 Mont. 548, 133 P. 962.

As it is the respondents' duty to meet for the purpose of electing two persons to fill the vacancies created in the city council by the recall election, let the peremptory writ of mandate issue.

It is so ordered.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

---

13 Cal.2d 666

## WERNER v. STATE BAR OF CALIFORNIA.

L. A. 16779.

Supreme Court of California.

June 22, 1939.

**1. Attorney and client 🔑54**

In proceeding to discipline an attorney, the Supreme Court is not bound by the findings or recommendations made by the local administrative committee nor their adoption by the board of governors and the court will examine the record anew to ascertain whether or not any charge has been proven against the petitioner which merits disbarment. St. 1927, p. 38.

**2. Attorney and client 🔑56**

Under the State Bar Act the final orders made by the Supreme Court are the only ones which were intended to have the effect of working disbarment, suspension or discipline of any person who might be subjected to the powers and processes with which the board of bar governors are invested. St. 1927, p. 38.

**3. Attorney and client 🔑54**

In determining whether disciplinary action was warranted against attorney for alleged unprofessional conduct, Supreme Court would refer to the findings of the local administrative committee, not that its findings were binding upon the court, but simply to aid the court in determining the weight of evidence upon which the court was called to act. St.1927, p. 38.

**4. Attorney and client 🔑53(2)**

Evidence was insufficient to warrant disciplinary action against attorney for alleged unprofessional conduct in soliciting professional employment through the instrumentality of an unlicensed person. Code Civ.Proc. § 287, subd. 2.

In Bank.

Petition by Erwin P. Werner to review an order of the Board of Governors recommending his suspension from the practice of law for the period of six months.

Proceeding dismissed.

Morris Lavine and Erwin P. Werner, in pro. per., both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for State Bar of California.

CURTIS, Justice.

By a notice to show cause and a subsequent supplemental notice, each issued by local administrative committee No. 4 for the county of Los Angeles, petitioner herein, Erwin P. Werner, an attorney at law, was directed to appear before said committee to show cause why he should not be disciplined for alleged professional misconduct upon five separate and distinct charges set forth in said notices. Four of these charges were based upon the alleged misconduct of petitioner in soliciting professional employment through the instrumentality of one Nathan Balkin, an unlicensed person, in violation of rule 2 of the Rules of Professional Conduct. The fifth charge involved the conduct of petitioner in the settlement of a claim for personal injuries in favor of one Manuel Martin. This charge was dismissed by the board of bar governors after the committee had found that there was no legal evidence to sustain the same. The action of the board in dismissing said charge is not called into question by this proceeding, so no further reference will be made to it.

The remaining four charges arose out of the alleged misconduct of the petitioner in soliciting employment as an attorney through the efforts of said Nathan Balkin in four personal injury matters, referred to in the record as the "Stirdivant-Lash Matter", the "O'Shaunnessy Matter", the "Lieb Matter" and the "Luciano Matter". These four charges were consolidated and all heard together by the committee. At the conclusion of the hearing the committee made and filed its findings of fact and conclusions in favor of petitioner. The committee found in each of said matters that Nathan Balkin did solicit each of said injured parties to employ petitioner as an attorney for the purpose of recovering damages for the personal injuries sustained respectively by each of said persons. It further found in the Stirdivant-Lash matter that, "At said time the said Balkin solicited the said Anna Stirdivant to employ Erwin P. Werner as her attorney for said purpose and on the following day, at or about the hour of 9 o'clock in the morning, as a result of a phone call by Benjamin Stirdivant at the solicitation of said Balkin said Erwin P. Werner called upon the said Anna Stirdivant, who was theretofore unknown to him, and discussed with her employment as her attorney in connection with said accident; that he did not solicit said employment as attorney. It is not true that at or about the time of said solicitation of employment on behalf of Erwin P. Werner by said Balkin that Erwin P. Werner agreed to compensate the said Balkin for his services in the event he was successful in securing the employment of said Erwin P. Werner, and it is not true that on or about December 26, 1934, said Erwin P. Werner had been fully advised by said Balkin of the contents of the police record of the accident which had resulted in the injuries to the said Anna Stirdivant; that said Anna Stirdivant declined to employ Erwin P. Werner as her attorney."

In each of the three other matters the committee found that, "At the time herein mentioned said Erwin P. Werner knew the said Nathan Balkin but did not know that he was soliciting professional employment for him in cases involving personal injuries." The conclusion of the committee based upon said findings was, "That respondent has not been guilty of a violation of his oath and duties as an attorney and counselor at law within the meaning of subdivision 2 of Section 287 of the Code of Civil Procedure." By reason of the foregoing findings and conclusion, the committee recommended that the charge against petitioner be dismissed, the committee stating that, "While this case, in the opinion of the committee, presented some very suspicious circumstances in support of the charges made, we do not feel that there is sufficient legal evidence upon which to sustain the charges."

The administrative committee forwarded to the board of governors of the State Bar its report of said proceeding together with its findings of fact, conclusions, and recommendation. Upon receipt, of said report and accompanying documents, the board of governors, upon the record before the committee, and without taking any further testimony, made its findings of fact and conclusions with respect to these four charges, and recommended that petitioner be suspended from the practice of law for the period of six months. It was to review this recommendation of the board of governors that this proceeding was instituted.

The findings of the board of governors differed from those of the committee in one respect only. While the committee inferentially in the Stirdivant-Lash matter, and expressly in the three other matters, found that petitioner did not know that Nathan Balkin was soliciting professional employment for him in cases involving personal injuries, the board of governors found to the contrary, that is, that petitioner knew that Nathan Balkin "was soliciting professional employment for him in cases involving personal injuries".

Practically the sole contention of petitioner is that the evidence is insufficient to support the findings of the board of governors that petitioner knew that Nathan Balkin was soliciting employment for petitioner in cases involving personal injuries.

We shall now proceed to a discussion of the evidence produced before the local administrative committee in support of these four charges.

### The Stirdivant-Lash Matter.

Anna Stirdivant and her daughter, Mabel E. Lash, were injured in an automobile accident on the night of December 24, 1934. A couple of days later one Nathan Balkin called upon each of these parties at the residence of Mrs. Stirdivant and solicited them to employ the petitioner as their attorney for the purpose of instituting actions to recover damages for their injuries sustained in said automobile accident. Balkin was not an attorney, but purported to represent petitioner. He told Mrs. Stirdivant and Mrs. Lash, and Benjamin Stirdivant, the son of Mrs. Stirdivant, that he had information that they were injured in an automobile accident and that he would like to have them take Mr. Werner as their attorney. He had with him what purported to be a record of said accident from the police department of the city. He informed them that Mr. Werner had been city attorney of Los Angeles. He urged Mrs. Stirdivant to write a letter to petitioner asking petitioner to call upon her in reference to her case and telling him that a friend of hers had recommended petitioner.

At the same time, Balkin requested Benjamin Stirdivant to go with him to a drug store and phone petitioner. At the instance of Balkin, the letter was written by Mrs. Stirdivant and mailed that afternoon by her son, Benjamin. The latter also accompanied Balkin to a nearby drug store and after Balkin had dialed a certain number, which he said was petitioner's telephone number, Benjamin Stirdivant took the telephone receiver at Balkin's direction and asked that petitioner come out to his mother's house, giving the name and address of his mother. Balkin then left in his machine, and the next day petitioner called at the Stirdivant home and interviewed both Mrs. Stirdivant and her daughter, Mrs. Lash. The latter declined to have anything to do with petitioner, but her mother went to petitioner's office the next day for the purpose of further consultation regarding the latter's employment. Petitioner in the meantime had prepared an agreement in writing setting forth the terms of his employment as Mrs. Stirdivant's attorney in case he should be employed in the proposed action. This agreement also fixed petitioner's compensation should Mrs. Stirdivant decide to employ him. Mrs. Stirdivant declined to sign the papers at the time, and said she wanted to take them home to have her husband read them. She left with the "papers" and that was the last petitioner saw of her. She did not employ him. Balkin was produced at the hearing before the local administrative committee and made a most unsatisfactory witness. His replies were usually, "I don't remember" or, "I refuse to answer on the ground that my answer might incriminate or degrade me." He did deny that petitioner had ever paid him anything to solicit professional employment in cases involving personal injury. Petitioner also denied that he had ever employed Balkin to solicit either Mrs. Stirdivant or Mrs. Lash, or any other person to employ him in personal injury actions. He said that he called at the Stirdivant home in response either to the telephone call or to a letter from Mrs. Stirdivant, and that he had no knowledge or information that Balkin had inspired either the telephone call or the letter.

### O'Shaunnessy Matter.

On or about February 13, 1935, Helen O'Shaunnessy was injured in an automobile accident in the city of Los Angeles. On the next day, Nathan Balkin called upon her and solicited her to employ petitioner to represent her in an action to recover damages for injuries sustained as a result of said accident. He presented her with the professional card of petitioner and proceeded with her in much the same manner as he had with Mrs. Stirdivant. He had no success on the first visit and returned a few days later. On this occasion the name of a former member of the board of bar governors was mentioned by a brother of Miss O'Shaunnesssy, whereupon Balkin became greatly excited and frightened and left the house at once. Petitioner never called on Mrs. O'Shaunnessy or had any communication with her, and the matter ended with the exit of Balkin from the O'Shaunnessy home. Petitioner made the same denials respecting the activities of Balkin in this matter as he had made in the Stirdivant-Lash matter. He further denied that he ever gave Balkin any of his (petitioner's) cards.

### The Lieb Matter.

George Lieb was injured in an automobile accident on March 8, 1935, in the city of Los Angeles. On the next day Nathan Balkin called on Tom Lieb, the son of George Lieb, presented petitioner's professional card, and solicited Tom Lieb to employ petitioner on behalf of his father for the purpose of recovering damages for injuries sustained in said automobile accident, and as in the preceding matters, extolled petitioner's ability as a lawyer, and urged him to telephone petitioner and state that a friend had told him to call up petitioner. Nothing seems to have resulted from the efforts of Balkin, as petitioner was never approached by any member of the Lieb family, nor did he take any action on Lieb's behalf in the prosecution of any action brought by Lieb, if in fact the latter ever brought any action. Petitioner testified that he never asked Balkin to solicit any case from Lieb, or from any other person, and that he never gave Balkin any of his professional cards.

### The Luciano Matter.

William Luciano was injured in an automobile accident on or about August 13, 1935. On the next day, Nathan Balkin called at the Luciano home, and there met the mother and two sisters of William Luciano. He solicited them to have William Luciano employ petitioner as his attorney in an action to recover damages sustained by reason of his injuries. He presented them with petitioner's card and followed much the same tactics employed by him in soliciting employment for petitioner by Mrs. Stirdivant and the others mentioned above. Balkin on being informed by the sisters that they would not move in the matter until they had consulted their brother, left the Luciano home and was not seen by any of the inmates until a few days later. About two days after Balkin's visit, one of the sisters of William Luciano called up petitioner on the phone and stated that she wanted to make an appointment with him, and also that she wanted to "see the little stout man with glasses who gave me your phone number to call you". Petitioner replied, "I don't know who you are talking about. I haven't anybody working for me." This ended the conversation. Two days later Balkin called again and had a conversation with Annabelle Luciano, one of William Luciano's sisters, who relates their interview as follows: "He said, 'Did you call up Mr. Werner?' and I said, 'Yes,' and he said, 'Do you know, he is very mad. I almost lost my job.' and I said, 'I am sorry but I wanted you to come back again so my brother could speak with you about the case. He didn't have an attorney at that time and we thought we should get your attorney you spoke about.' And so he said, 'Of course, he would not know me,' He said, 'You must not do that,' and he got sore at me and he said, 'Don't do it any more.' and I said I would not do it any more. 'You don't want me to lose my job?' and I said, 'Of course not.' Thereupon Balkin left the house." Petitioner denied that he ever had any conversation with Balkin about the Luciano case, or that he ever told Balkin that he "was mad" about anything connected with the case. He made no denial of having the telephone conversation with Annabelle Luciano.

Balkin pleaded guilty to a complaint filed in the municipal court of the city of Los Angeles charging him with soliciting professional employment in the four matters heretofore set forth, but the name of the attorney in whose behalf he was charged with soliciting employment was not alleged in the complaint filed against him. He admitted that he was engaged in that business for a number of years in Chicago, where it was not in violation of the law, before coming to this state, and he further stated that he knew no other business and had engaged in it since coming to this state. He had some legal business with an attorney who had his office in the same suite of rooms in which petitioner had his office. The evidence does not show that he had any legal business with petitioner. The evidence is in some conflict as to the frequency he was seen in the common reception rooms of such suite of offices. There is evidence that he was seen in Mr. Werner's office on a few occasions, but not often. Petitioner admitted that he knew Balkin and saw him at times in the reception room of his office and on a very few times in his own office. On one of such occasions Balkin was selling neckties.

[1, 2] In reviewing the evidence, findings and conclusions of the board of bar governors, it is the duty of this court to re-examine the entire proceedings before said board as they are required to be kept, and transmitted to this court. In re Shattuck, 208 Cal. 6, 279 P. 998. "This court is not bound by the findings or recommendations made by the local administrative com-

mittee, nor their adoption by the Board of Governors, and will examine the record anew to ascertain whether or not any charge has been proven against petitioner which merits disbarment." In re Stafford, 208 Cal. 738, 284 P. 670, 671. "The only order or orders which are provided for therein [the State Bar Act], and which have or were intended to have the effect of working the disbarment, suspension, or discipline of any person who might be subjected to the powers and processes with which the Board of Bar Governors are invested, are the final orders which are to be made by this court under the provisions of said act." In re Shattuck, 208 Cal. 6, 12, 279 P. 998, 1000.

It follows from the foregoing and prior decisions of this court as well as from the provisions of the State Bar Act, St. 1927, p. 38, that it is the duty of this court to pass upon the evidence, weigh its effect, and finally determine whether it is sufficient to sustain the charges against the accused attorney.

The evidence shows without any question that the witness Balkin did solicit on the various occasions set forth in the four charges against petitioner the employment of petitioner as attorney for the purpose of instituting actions to recover damages for the several injuries sustained respectively by the injured persons. The only question in serious dispute is whether Balkin in soliciting said employment did so with the knowledge and consent of petitioner. As to petitioner's knowledge of Balkin's activity in petitioner's behalf, the local administrative committee found in favor of petitioner, while the board of bar governors upon the same and identical evidence found against petitioner.

It is apparent that there is no direct evidence that Balkin in soliciting employment for the petitioner was acting for petitioner with either his knowledge or consent. The evidence that petitioner knew of Balkin's activity in his behalf is entirely circumstantial. In the Lieb matter there is not even any circumstantial evidence which tended to show that petitioner knew that Balkin was soliciting employment for him. A reading of the evidence shows simply that Balkin called upon relatives of the injured party and asked them to employ petitioner and gave to them petitioner's card. None of these parties ever saw petitioner or had any conversation with him over the telephone or otherwise. The only place in the evidence respecting the charge where petitioner's name appears is in the conversation between Balkin and the injured party's relatives which was had not in the presence of the petitioner, and there is absolutely no evidence showing that petitioner in any way authorized the use of his name by Balkin, or had any knowledge that Balkin was making use of petitioner's name in the solicitation of his employment by the relatives of the injured person.

In the Luciano matter the evidence against petitioner is slightly, if any, stronger against petitioner than that in support of the Lieb charge. After Balkin had called upon the relatives of Luciano, given them petitioner's card, and asked them to communicate with petitioner, a sister of William Luciano some two days later called petitioner on the telephone, and after stating to him that she wanted to make an appointment with him, said she wanted to see "a little stout man", evidently describing Balkin. Petitioner replied, "I don't know who you are talking about." Miss Luciano then said, "He gave me your phone number to call you." To this remark respondent replied, "I haven't anybody working for me." Miss Luciano replied, "Okay, thanks", and put down the telephone. There was surely nothing in this incident which would tend to connect petitioner with the activities of Balkin. The latter a few days later called at the Luciano home and asked Miss Luciano if she had called up Mr. Werner, and she replied that she had. In the absence of any evidence connecting petitioner with the acts of Balkin what transpired at this second visit, and whatever conversation was had between Balkin and Miss Luciano was not legal evidence against petitioner.

In the O'Shaunnessy matter, the evidence against petitioner lacks any evidentiary support whatever. It shows that Balkin called upon Miss O'Shaunnessy, and as on the other occasions he solicited her to employ petitioner, giving her petitioner's card and asking her to write or telephone petitioner. She did neither. Balkin called at a later date, but as hereinbefore stated, he became frightened at the mention of a certain attorney's name and left hurriedly and never returned. There is not a scintilla of evidence in the entire record which even tended to show that petitioner knew of either of these visits of Balkin to the O'Shaunnessy home, or that he had any connection with or knowledge of Balkin's efforts to secure his employment by Miss O'Shaunnessy.

In the Stirdivant-Lash matter, petitioner did, upon receiving a telephone message from Benjamin Stirdivant, call upon Mrs. Stirdivant and Mrs. Lash and confer with Mrs. Stirdivant respecting his employment as her attorney to recover damages sustained by her in the automobile accident. He further met her at his office by appointment, and he presented to her a proposed contract which he had drafted defining the terms of his employment and fixing his compensation. Mrs. Stirdivant did not sign the contract, but took it with her, and petitioner never heard from her in regard to her case again. It is true that the telephone message sent to petitioner by Benjamin Stirdivant was prompted by Balkin, but there was nothing in the message that indicated to petitioner that Balkin had inspired it. Nor is there any evidence to indicate that petitioner had any knowledge that Balkin had visited the Stirdivant home.

[3] Balkin was called as a witness upon this charge as in the other three. As stated before he proved a most unsatisfactory witness. He did, however, deny that petitioner had ever employed him to solicit business for him or had ever paid him for any work of that character. Petitioner himself took the witness stand and denied that he had ever employed Balkin to solicit business for him and denied that he had any knowledge that Balkin was engaged in soliciting business for him. Taking the evidence against petitioner upon this as well as the other charges, we are not impressed with its evidentiary value. While the proof is clear that Balkin was soliciting business for petitioner, it may well be asked why was he doing so if he was "to get nothing" out of the business after it was received? We must admit that this evidence raises a strong suspicion that Balkin was acting for petitioner and with the knowledge of the latter. If we were to concede that this evidence justified an inference at least in the Stirdivant matter that respondent had knowledge of Balkin's activities, this inference would be sufficient to sustain the truth of the charge against petitioner involving the Stirdivant matter. However, this inference is contrary to the testimony of petitioner that he had no such knowledge. If petitioner's testimony is true, then we would be justified in holding that he was not guilty of the charges, or of any of them, preferred against him. To pass upon the weight to be given the testimony of any witness when only the written record is before a reviewing body is always a most difficult undertaking. In this connection we think it proper to refer to the findings of the local administrative committee, not that its findings are binding upon us but simply to aid the court in determining the weight of the evidence upon which we are called to act. This committee was composed of three reputable and experienced members of the Los Angeles Bar. The members of that committee gave a great deal of time and unusual care in hearing the charges against petitioner. A record of more than nine hundred pages of testimony is before us as having been introduced at the hearing. The rulings of the committee upon the admission of evidence and upon other questions raised at the hearing are quite numerous. They all appear to be fair and just. No complaint is made by either party as to any ruling or other action taken by the committee except as to its final action. This committee personally contacted the witnesses at the hearing. They observed their conduct and demeanor while testifying, and the character of their testimony, and no doubt took into consideration the interest of the petitioner in the result of said hearing. As they found in favor of the petitioner, they evidently believed he was telling the truth when he disclaimed any connection with Balkin's activities. The members of the committee were in far better position to pass upon the truthfulness of petitioner's testimony than were either the members of the board of bar governors, or are the members of this court. In Mauer v. State Bar, 219 Cal. 271, 276, 26 P.2d 14, 16, this court stated its views in that respect as follows: "However, bearing in mind that local administrative committee No. 8, which heard the witnesses and was in a better position to judge the certainty of the offense than we are, or the board of governors before whom he failed to appear, recommended suspension for eighteen months, and that the second administrative committee, in like favorable position, recommended a reprimand only, it would seem that suspension for a period of three years should convince petitioner and any other person with similar inclinations that such transactions will not be tolerated in the profession." In Egan v. State Bar, 10 Cal. 2d 458, 462, 75 P.2d 67, 68, we find a sim-

ilar expression in the following language, "The recommendation of the local committee, which was in closer touch with the personal attributes of petitioner and the background of the case on the hearing than are we on the record, has caused us to hesitate to award the extreme penalty provided by law."

[4] The finding, therefore, of the local administrative committee as to the truth of the charges against the petitioner having been founded upon this personal contact with petitioner and the other witnesses in the case, is entitled to our respectful consideration, and causes us to hesitate from a mere reading of the printed record before us to arrive at a conclusion contrary to that of the committee. Accordingly it is our conclusion that none of the four charges against petitioner as alleged in the original and supplemental notices to show cause, and hereinbefore discussed in detail, is sustained by the evidence. It is therefore ordered that this proceeding against petitioner be and the same is hereby dismissed.

We concur: EDMONDS, J.; SHENK, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.

---

13 Cal.2d 691

## In re ALLSHOUSE'S ESTATE.

## DAVIS et al. v. ALLSHOUSE.

L. A. 16535.

Supreme Court of California.

June 22, 1939.

Rehearing Denied July 20, 1939.

**1. Husband and wife 🔑246**

As respects descent of property under statute on death of wife without issue, the origin of the property may be traced into a foreign jurisdiction and a California classification as to whether the property was the separate property of a previously deceased husband or was community property may there be applied provided the foreign and the California classifications are not irreconcilable as to the incidents of ownership, the essential rights secured and the persons in whom they vest. Probate Code, §§ 228, 229; Civ.Code, §§ 163, 164.

**2. Husband and wife 🔑274(1)**

Personal property owned by husband in Missouri prior to his marriage or acquired thereafter with assets possessed prior to the marriage or by gift, devise, descent, or bequest was his "sole property" under Missouri common law or "separate property" under California community property laws within statute returning "separate property" to husband's family upon death of wife intestate and without issue. Probate Code, § 229; Civ.Code, § 163.

[Ed. Note.—For other definitions of "Separate Property," see Words & Phrases.]

**3. Husband and wife 🔑274(1)**

Personal property which deceased husband acquired during period of marriage and held in sole ownership subject to wife's dower right and which never left Missouri where husband was domiciled could not, upon death of wife intestate and without issue while domiciled in California, be reclassified either as separate property of the husband or as community property within descent statute returning husband's separate property to his family upon death of wife intestate and without issue. Probate Code, §§ 228, 229; Civ.Code, §§ 163, 164.

**4. Husband and wife 🔑246**

Where there is a change of marital domicile or a change of situs of property owned by a husband or wife from a common law to a community property jurisdiction, the property may be reclassified under the community property laws.

**5. Descent and distribution 🔑61**

Personal property held by deceased husband in common-law sole ownership in Missouri was distributable upon death of widow intestate and without issue while domiciled in California as her "separate property," where statute did not provide that such property of husband acquired by widow and brought into California should revert to husband's family. Probate Code, §§ 225, 229.

**6. Descent and distribution 🔑61**

Where Missouri realty held by husband and wife as tenants by the entirety was exchanged for California realty which husband and wife held as joint tenants, an undivided one-half interest in the California realty was "separate property" of wife and distributable as such at her death and the other one-half interest which husband quitclaimed to wife before his death was a "gift" of husband's "separate property" which under statute returned to husband's family at wife's death intestate and without issue. Probate Code, §§ 225, 229.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

**7. Husband and wife** ⚷14(2)

Under Missouri law, where tenancy by the entirety is created in land purchased by husband with his funds it is presumed that husband has made a "gift" to the wife of her joint interest in the whole.

**8. Descent and distribution** ⚷61

Where Missouri realty held by husband and wife as tenants by the entirety was exchanged for California realty which husband and wife held as joint tenants, wife's undivided one-half interest in the California realty was her own "separate property" as respects succession statutes notwithstanding wife's interest in the Missouri realty originated in a gift to her by husband. Probate Code, §§ 225, 229.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding in the matter of the estate of Viola L. Allshouse, deceased, wherein Sarah Davis and others presented a petition for determination of heirship which was contested by Harry A. Allshouse, Jr. From a decree in favor of contestant, petitioners appeal.

Reversed.

Prior opinion, see 81 P.2d 169.

Eckman & Lindstrom, Ralph G. Lindstrom, and Arthur W. Eckman, all of Los Angeles (R. L. Moore, of Los Angeles, of counsel), for appellants.

Voltaire Perkins, of Los Angeles, H. B. Jack Manard, of Kansas City, Mo., and Anderson & Anderson, of Los Angeles, for respondent.

PER CURIAM.

In this proceeding for determination of heirship, the appellants, three brothers, a sister and a nephew, of Viola L. Allshouse, deceased, are her heirs. They have appealed from a decree which adjudges that respondent, the son by prior marriage of the predeceased husband of decedent, is also an heir, and is entitled by virtue of section 229 of the Probate Code to succeed to substantially all of decedent's estate.

The appeal presents solely a question of law as most of the major facts are covered by stipulation of the parties. The legal problem is to correctly classify the properties in the estate in order to determine what portion or portions thereof are subject to the provisions of section 229, supra. That statute, so far as here pertinent, provides: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse * * *." The precise point to be decided is what, if any, portion of the property found by the trial court to have come to decedent from her husband by gift, devise, and bequest, was "separate property" of the previously deceased spouse, within the meaning of the statute.

The decedent, Viola L. Allshouse, and Harry A. Allshouse, Sr., were married in the year 1919. Both were then domiciled in the state of Missouri, and that domicile was retained during the entire period of the marriage. Mr. Allshouse died on March 1, 1931, and about two weeks thereafter the widow established a domicile in California. She spent her remaining years in this state, passing away on April 1, 1936, intestate and without issue.

The inventory of her estate showed the following assets, of a total appraised value of $58,481.41: (1) cash, $467.18; (2) United Corporation, 7 shares of common stock, $50.75; (3) American International Corporation, 13 shares, $146.25; (4) Parke, Davis & Co., 1111 shares of capital stock, $49,300.63; (5) Federal Savings & Loan Society of Kansas City, Mo., 10 shares, $1,000; (6) household and personal effects, $1,516.60; (7) Los Angeles real property, $6,000.

Except for the first three items, of a total appraised value of $664.18, respondent was, by the decree entered herein, adjudged entitled to receive all of the above property, items 4–7, together with all the dividends, rents, issues, and profits therefrom acquired since April 1, 1936.

Tracing the history of decedent's acquisition of items 4–7, attention is first directed to item 4, the $49,300.63 worth of stock which comprises the bulk of the estate, 1111 shares of Parke, Davis & Co. Mr. Allshouse was for many years the manager of that concern. Between 1907 and 1925, he acquired 450 shares of its common stock—120 shares prior to his marriage in 1919 to decedent and the other 330 thereafter, but in part the 330 shares were paid for with funds possessed prior to the marriage. On June 18, 1928, this stock was "spread" five to one, so that the 450 shares became 2250. On June 30th Mr. Allshouse prepared a will devising 500 shares to respondent, and directing that the remaining 1750 shares be held in trust for payment of income therefrom to decedent during her life and distribution to respondent at her death. However, on August 3, 1929, he transferred 1000 of these shares to decedent by way of gift, with the result that only 1250 shares were in his estate at his death in March, 1931. Of the latter shares, 500 were distributed to respondent, 360 were sold to pay costs of administration, and 390 were held in the trust and distributed to respondent at its close. The 1000 shares given to decedent were still held by her at her husband's death, and thereafter she purchased 100 additional shares upon the open market and also received an 11 share stock dividend, thus increasing her ownership to 1111 shares. At the time of her own death she no longer had the original certificates evidencing her ownership, because of a wrongful conversion of the stock from her and later recovery, but she held certificates for the same amount and class of stock, which represent the 1111 shares acquired in the manner above described.

Item No. 5 represents 10 shares in Federal Savings and Loan Society of Kansas City, Missouri, valued at $1,000, which, so the evidence shows, were acquired by Mr. Allshouse in 1925, and transferred by him to decedent in February, 1929. He had previously made a similar stock gift to respondent. Whether or not he purchased the stock with funds possessed prior to his marriage to decedent is not revealed.

The household and personal effects appraised at $1,516.60, item No. 6, were devised to decedent by Mr. Allshouse, and distributed to her in the proceedings had in Missouri for the probate of his will.

The last item, No. 7, Los Angeles real property valued at $6,000, came to decedent in the following manner: Mr. Allshouse purchased a parcel of real property located in Jackson county, Missouri, in September, 1919, which was about three months after he married decedent. The evidence intimates that the purchase price was paid with funds possessed by him prior to the marriage, but this is not clearly established. Title was taken in the name of the spouses as tenants by the entirety. In May, 1929, this Missouri property was exchanged for California real estate taken in joint tenancy. In August, 1929, Mr. Allshouse delivered a quitclaim deed of his interest in the joint tenancy to decedent, thus placing full title and ownership of the land in her.

It is practically conceded that all of these assets, items 4-7, had their origin in property which came to decedent from her husband by gift, devise, or bequest. While there is some suggestion that in 1928 and 1929, Mr. Allshouse may have intended, by the preparation of his will and by transfers to both respondent and decedent, to effect an equal division of his property between the two in consideration of an agreement on the part of decedent not to contest the will, that such was the case is not proved by the evidence. On the contrary, the fact is stipulated that the transfer to decedent of the main item of value, the Parke Davis stock, was a gift; so far as is shown the other transfers too were made without consideration. That was the conclusion of the trial court, and its findings have sufficient support in the record.

The only question therefore is whether the trial court was correct in further concluding that this property so given, devised, and bequeathed to decedent by her husband was his "separate property" as that term is used in the California statute of succession. Sec. 229, supra.

Had the property been acquired in California, it would have fallen into the following three divisions: First, personal property owned by the husband prior to his marriage to decedent, or acquired thereafter with assets which he possessed prior to said marriage, or by gift, devise, descent, or bequest. This would have been the husband's separate property (Civ.Code, sec. 163), and the portion of decedent's estate traceable thereto would be distributable to respondent (sec. 229, supra). Second, all other personal property accumulated by the husband during the period of the marriage. This would have been community property (Civ.Code, sec. 164), and the portion of decedent's estate traceable thereto would also be distributable to respondent (Probate Code, sec. 228). Third, real property held by the spouses in joint tenancy, with later quitclaim deed from husband to wife. Classification and distribution of this item would depend upon the facts which attended the creation of the joint tenancy.

The above classifications, however, are not here controlling because all of the property was in fact acquired by the spouses while domiciled in Missouri, which is not a community property state. That jurisdiction adheres to the common law. Property there accumulated during marriage, which would in California be community, is denominated the sole property of the husband, subject only to the wife's right of dower. This is an ownership which differs in its incidents from either community property, or separate property distinguished from community, as those terms are employed in a community property jurisdiction, although it partakes more nearly of the nature of separate property than of community.

Respondent urges that in order to give effect to the California statutes of succession the Missouri holding of the husband in Missouri must be reclassified under a community property classification, and that it should be denominated separate property. Appellants, on the other hand, urge that the property classifications of the two jurisdictions are irreconcilable, and inasmuch as sections 228 and 229 of the Probate Code do not provide for succession to property originating in transfers to a wife by gift, devise, and bequest from property held by her husband in common law ownership sole, those statutes may not be relied upon by respondent in support of his asserted heirship. It is urged that the source of decedent's estate should not be traced beyond the borders of this jurisdiction, but that the property should be distributed according to the classification which it acquired when decedent became a resident of California. That is to say, decedent was unmarried, a widow possessed of a separate estate, at the time she established her California domicile. All of the property which had originated in transfers to her from her husband had passed into her sole ownership. Separate property (other than that referred to in section 229) of a decedent who leaves neither issue, spouse, nor parent, passes pursuant to section 225 of the Probate Code to the decedent's brothers, sisters, and descendants of deceased brothers and sisters by right of representation. Under this classification appellants would inherit, to the exclusion of respondent.

[1] It is our view that the property classifications of the two jurisdictions are only partially irreconcilable, and that it is not erroneous, for purposes of succession, to trace the origin of an estate into a foreign jurisdiction and to there apply a California classification, provided the foreign ownership possessed substantially the incidents of the California property holding under which it is to be classified. But such a reclassification is clearly wrong if the effect of imposing the community property ownership upon the foreign or common law holding would be to vary or defeat rights incident to that holding in a case where the property itself never left the foreign jurisdiction, and its owner was never domiciled in the community property state. Furthermore, in considering which classifications are common to both jurisdictions, and which are irreconcilable, the title of the ownership should not be determinative, but the incidents thereof, the essential rights secured, and the persons in whom they vest. So far as is possible these rights should be protected in working out the solution of problems concerning the status of property touched by the laws of both jurisdictions. McKay, Community Property, § 646, p. 438; 31 C.J. § 1080, p. 15.

With these preliminary observations, we may proceed to determine the proper classification of the three above mentioned divisions of property.

[2] First. Personal property owned by the husband prior to his marriage to decedent, or acquired thereafter with assets which he possessed prior to said marriage, or by gift, devise, descent, or bequest. This was clearly separate or sole property of the husband in the simplest sense of that term, and to so classify it does no violence to either Missouri or California property laws, or to essential rights of the parties. Although some of the incidents of this ownership in the common law jurisdiction may have differed from those which would have obtained in the community property state, the variance is not substantial so far as the right of succession is concerned. The ownership was in essence that of the very type of property which it is the intent and purpose of section 229 to return to the husband's

family upon death of the wife intestate and without issue.

Respondent should therefore succeed to that portion of decedent's estate which is traceable to property within this first classification. The present record does not afford a sufficient basis for fixing the extent of this proportion. The evidence indicates that the husband was possessed of considerable wealth when he married decedent, but his earnings at that time, and for several succeeding years, were also generous. As manager of Parke, Davis & Co. he received a monthly salary of from $1,100 to $1,200, and even after an illness forced him to retire, he received a life pension of $150 a month. It is impossible to estimate with any degree of precision what part of his transfers to decedent represented his pre-marital assets, including the rents, issues, and profits thereof, and what part represented accumulations resulting from his efforts during the period of the marriage. Upon a retrial of the cause proof may be directed to this issue.

[3, 4] The second division covers all other personal property acquired by the husband during the period of the marriage. This property, which would in California have been community, was held in Missouri by the husband in sole ownership, subject only to the wife's dower right. Such ownership, as heretofore mentioned, differs in substantial aspects from that of either community or separate property as those terms are employed in a community property jurisdiction. It differs from community property in that it vests a greater right in the husband. It differs from the husband's separate property in that it includes the wife's right of dower, which although inchoate is exceedingly valuable. Chrisman v. Linderman, 202 Mo. 605, 100 S.W. 1090, 10 L.R.A.,N.S., 1205, 119 Am. St.Rep. 822. It therefore cannot properly be reclassified as either by the new jurisdiction while its situs and the domicile of its owner remain in the old.

Had the husband brought the property to this state, or had he become domiciled here, the rule would be different, for it is well settled that foreign property, when subjected to the laws of a community property jurisdiction, may be reclassified thereunder. Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343; Estate of Warner, 167 Cal. 686, 140 P. 583; Estate of Arms, 186 Cal. 554, 199 P. 1053; 31 C.J., § 1083, p. 16; Shea v. Commissioner of Internal Revenue, 9 Cir., 81 F.2d 937. But the fact that the present case concerns a situation where both owner and property were at all times in Missouri makes it clearly distinguishable from those cases which treat of changes of property classification created by a change of marital domicile, or change of situs of property, from a common law to a community property jurisdiction. It is only where such changes have occurred, and the husband has brought marital assets held by him in common law sole ownership into the community property jurisdiction, thus subjecting them to its laws and classifications, that they have been held subject to reclassification as his separate property. Such reclassification finds its justification in the fact that community property law has only the two classes of ownership, and although the conversion into separate property creates an interference with the wife's dower right, it does not cause the disturbance of vested rights which would result from a conversion of the property into community.

But the facts of the present case afford no basis for application of the rule. The husband stayed in Missouri and there made provision for his wife and for respondent in contemplation of the operation of the property laws of that jurisdiction. There was no change of marital domicile; no change of situs of the property. The assets were still in Missouri at the time of the husband's death, and they there passed into the ownership of the widow. The widow's act in later establishing a domicile in this state, subjecting her property to its laws, should not have the retroactive effect of a prior act of the husband which would have changed the nature of his own ownership. In short, to reclassify the husband's Missouri holding would be for this state to reach beyond its borders and impose its substantially different classification upon both a former owner and a former ownership which obtained in a foreign jurisdiction. This may not be done.

[5] Respondent, therefore, is not entitled by virtue of section 229, supra, to distribution of the division of property here under discussion. And as there is no California statute of succession which provides that the estate of a widow which originated in transfers to her of property held by her previously deceased husband

in common law sole ownership shall revert to the husband's line, an estate derived from such source and brought into California by the widow, who here died intestate and without issue, is her separate property, having for purposes of application of the laws of succession the same status as the separate property of one who has never married. It follows that the portion of decedent's estate which comes within this classification is distributable under section 225 of the Probate Code.

[6-8] Third and last is the matter of determining whether the California real estate was given, devised, or bequeathed to decedent by her husband from his "separate property". The history of this real estate has been hereinbefore set forth. It was received by decedent and her husband as joint tenants (the husband later quitclaiming his interest to decedent) in exchange for Missouri real property, which they held as tenants by the entirety. The latter ownership bears substantial similarity to a California joint tenancy with right of survivorship. United States v. Jacobs, 59 S.Ct. 551, 83 L.Ed. ——; Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67, L.R.A.1918C, 1009; Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W. 72. It thus appears that decedent's joint tenancy interest was taken by way of purchase and not of donation. That is to say, in consideration of relinquishment of her Missouri interest as tenant by the entirety, she received an interest as joint tenant in the California property, and at the same time the husband did likewise. Decedent's California joint tenancy interest was her separate property; the husband's like interest was his separate estate, and when he conveyed it to decedent by quitclaim deed, it was a gift to her of his separate property. It follows that the ownership which was vested in decedent at the time of her death is, as to an undivided one-half interest, traceable to a gift from her predeceased spouse of his separate property, to which respondent is entitled to succeed. The other undivided one-half interest came to decedent from her own separate property, and is distributable under section 225, supra.

In making this pronouncement we are not unmindful of the fact that the Missouri estate by the entirety was purchased by the husband with funds which he possessed either prior or subsequent to his marriage to decedent, and that where a tenancy by the entirety is so created, the presumption under Missouri law is that the husband has made a gift to the wife of her joint interest in the whole. Alexander v. Alexander, Mo.App., 44 S.W.2d 872. However, it would in our opinion be erroneous, in tracing the California holding for purposes of succession, to look beyond its origin in the tenancy by the entirety in the common law jurisdiction in order to find the source of the latter tenancy. This is so because of the differing property laws and classifications of the two jurisdictions, and the care which should be exercised to avoid any unnecessary invasion of vested rights. Therefore even if it can be said that decedent's interest in the Missouri real property in fact originated in a gift to her by the husband of his separate property, the creation of the tenancy by the entirety followed by transmutation into a California joint tenancy, must be held to have broken the chain of the gift so far as application of the statutes of succession of the community property jurisdiction is concerned.

The decree is reversed.

---

13 Cal.2d 681

## PEOPLE v. DAVENPORT.

Cr. 4158.

Supreme Court of California.

June 22, 1939.

Rehearing Denied July 20. 1939.

**1. Licenses 🔑18½**

The usual contract for the purchase and sale of property in the ordinary course of business is not within the purview of the Corporate Securities Act, but fact that a transaction is clothed in the language and form of such a purchase and sale contract is not in itself conclusive, and court may in proper circumstance look through the form to substance to determine whether transaction falls within the inhibitions of the act. St.1917, p. 673.

**2. Statutes 🔑193**

In construing a statute, words of general import may be given a contracted meaning dependent upon the connection in which they are employed.

**3. Statutes** ⚷189

In construing a statute, words will not be given their literal meaning when to do so would carry the operation of the enactment beyond the legislative intent and make its provisions apply to transactions never contemplated by the legislative body.

**4. Licenses** ⚷18½

Under the Corporate Securities Act, words or phrases of general import such as "note" and "evidence of indebtedness" were intended to possess the same general characteristics as the word "security," but it was not the legislative intent that every note or evidence of indebtedness regardless of its nature and of the circumstances surrounding its execution should be considered as included within the meaning and purpose of the act. St.1933, pp. 2309, 2311, § 2(a)(7), (b)(10, 11).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

**5. Licenses** ⚷18½

The expectation of payment of interest does not transform a transaction into an "investment contract" within the meaning of the Corporate Securities Act. St.1933, pp. 2309, 2311, § 2(a)(7), (b)(10, 11).

[Ed. Note.—For other definitions of "Investment Contract," see Words & Phrases.]

**6. Licenses** ⚷18½

A contract to purchase building and loan association certificates from owner and to pay him purchase price in 25 monthly installments at stipulated interest, where seller of certificate was not given any interest in any portion of the business of the purchaser and had a right to be paid whether purchaser's business prospered or not and in event of purchaser's death was protected in the matter of payment by life insurance, did not constitute a "security" which would necessitate a permit from the commissioner of corporations to be secured before the sale thereof. St.1933, pp. 2309, 2311, § 2(a)(7), (b)(10, 11).

---

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Noel Davenport was charged with violation of the Corporate Securities Act. From a judgment sustaining the demurrer to eighteen counts of an amended indictment, the People appeal.

Affirmed.

Rehearing denied; CURTIS and SHENK, JJ., dissenting.

For prior opinion, see 76 P.2d 117.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Morris Lavine, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal by the People from a judgment sustaining a demurrer to eighteen counts of an amended indictment, in each of which defendant was charged with a violation of the Corporate Securities Act, St.1917, p. 673.

By the indictment defendant was accused of issuing and selling securities in the form of a series of agreements, the first of which was dated October 23, 1933, and the last, April 10, 1934. Except for names, dates and amounts, the various counts were practically identical and only one need be described here. In the first count it was charged that "The said Noel Davenport, on or about the 23rd day of October, 1933, at and in the County of Los Angeles, State of California, did wilfully, unlawfully, feloniously and knowingly authorize, direct and aid in the issuance and sale of, and did issue, execute and sell, and assist in causing to be issued, executed and sold to Ella J. Bloom for value, a security of his own issue, to-wit, an evidence of indebtedness, note and investment contract, said security not being one issued, given or acquired in a bona fide way in the ordinary course of legitimate business, trade or commerce, and said security being one issued for sale to the public by the said Noel Davenport, the said Noel Davenport not having first applied for and secured a permit from the Commissioner of Corporations of the State of California so to do; the said security being in words and figures as follows, to-wit: * * *." There follows a copy of an "agreement" signed by the respondent as first party and by Ella J. Bloom as second party. That agreement contained the following:

"*Declaration of First Party.* That he now is and for some considerable time heretofore has been engaged in the business of buying and selling gold and silver bullion, maintaining a principal place for the transaction of said business at Nogales, Arizona, in the conduct of which he has contracted to purchase the gold and silver production from a number of mining properties now in actual operation in the Altar Mining District of Mexico.

"That to avail himself of the increased production of said bullion additional capital is required to finance his operations, which will be used only in the business of merchandising gold and silver bullion and for no other purpose whatsoever.

"That his present and past experience leads him to believe that the continuance of this business will be profitable and his experience has been that a profit of not less than fifty (50%) per cent can be realized upon shipments of bullion as they are made from time to time.

"That he is thoroughly conversant with the character of business in which he is now engaged and conducts said business on his own individual responsibility, and that he believes that he is established in a way that he can continue to operate successfully in the future.

"*Declaration of Second Party.* That he has read the above and foregoing statement and that First Party has made no representations other than therein contained to induce him to execute this agreement and that he does so freely and voluntarily, on his own initiative and responsibility without any promise, agreement, representation, or inducement except as herein contained, and with no hope of profit or reward other than the payment of the purchase price herein stipulated.

"That said sale is made without any restriction or limitation with the understanding that First Party may use and dispose of said securities as the absolute owner thereof and that his agreement to pay therefor as herein provided is the sole and only consideration therefor, and that the only obligation of First Party is the debt evidenced hereby.

"That he has made no representation as to the value of said securities and that the selling price therefor is fixed and determined without reference to the present market value and that any difference between the selling price as fixed hereby and the market value shall not be a defense available to First Party either on the ground of usury or otherwise.

"By reason whereof, the said Parties do hereby agree as follows: * * *."

Thereafter, the agreement contained provisions by which the first party agreed to buy, and the second party agreed to sell to him, for $795.47, certain building and loan certificates, for which the first party agreed to pay in twenty-five equal monthly instalments, with interest on deferred payments at seven per cent per annum, payable quarterly, and the first party acknowledged receipt of the certificates, the said certificates bearing "the proper endorsement thereon transferring title to First Party". The agreement also provided that the payments thereon would be made at a certain bank; that as collateral security the first party would insure his life, naming the bank as beneficiary and providing that in the event of his death the proceeds would be applied upon any amount due to the second party; that if four consecutive instalments were not paid the whole amount might be declared due; and that "This instrument is non-negotiable and shall not be assigned by either party without the written consent of the other".

The determinative question presented by the appeal is whether the transactions had between the respondent and others named in the various counts of the indictment in fact amount to sales of "securities" within the meaning of the Corporate Securities Act.

The appellant contends that the transactions here involved were "investment" contracts or "evidences of indebtedness" within the meaning of the Corporate Securities Act. On the other hand, the respondent contends that each agreement pleaded is merely one for the purchase and sale of personal property, and not a "security" as defined in the act.

[1] Although it is obviously true that the usual contract for the purchase and sale of property in the ordinary course of business is not within the purview of the Corporate Securities Act, nevertheless the mere fact that a transaction is clothed in the language and form of such a purchase and sale contract is not in itself a conclusive badge of its innocence. In proper circumstances "courts have looked through form to substance and found that in fact the transaction *contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share*". (Emphasis added.) Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 51 P.2d 73, 76. It may be conceded that, in some circumstances, judicial tribunals

have concluded that a contract, or even a deed, regular upon its face, has been found to constitute a "security" as that word was intended to be used in relation to the act, and within the scope and purpose of the legislation.

In the instant case, the defendant was charged in each count of the indictment with having sold a "security", which amounted to, or was in the nature of, an "evidence of indebtedness", a "note", or an "investment" contract. The provisions of section 2(a), subdivision 7, of the act, St. 1933, p. 2308, 2309, which were in effect at the time of the transactions here involved, and upon which the indictment was based, provided that a "security" was to include "any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a *profit-sharing* agreement, * * * investment contract, or beneficial interest in title to property, *profits* or *earnings* * * *." (Emphasis added.) But under section 2(b), subdivisions 10 and 11 thereof, the following exceptions were made: "bills of exchange, trade acceptances, promissory notes and other commercial paper issued, given or acquired in a bona fide way in the ordinary course of legitimate business, trade or commerce. * * * *Promissory notes*, whether secured or unsecured, where the notes are not offered to the public. * * *" (Emphasis added.)

[2-4] In construing the provisions of section 2(a), subdivision 7, which provide that "The word 'security' shall include * * * any note, * * * evidence of indebtedness, * * * investment contract * * *", etc.—in the light of the rules relating to the construction of statutes, which provide that words of general import may be given a contracted meaning dependent upon the connection in which they are employed, and considering the general purpose or scheme entertained by the legislature in passing the statute; and the rule that words will not be given their literal meaning when to do so would evidently carry the operation of the enactment far beyond the legislative intent and thereby make its provisions apply to transactions never contemplated by the legislative body (Lewis v. Creasey Corporation, 198 Ky. 409, 248 S.W. 1046)—it is clear that the legislature intended by the use of the words or phrases of general import in said section, such as "note" and "evidence of indebtedness", that each such expression should possess the same general characteristics as the word "security", within the meaning of which the legislature provided that they were to be included. Furthermore, since, for example, the legislature specifically excepted from the operation of the act "promissory notes", falling within the provisions of section 2(b), subdivisions 10 and 11, hereinbefore referred to, it plainly was not the legislative intent that "*every*" note or evidence of indebtedness, regardless of its nature and of the circumstances surrounding its execution, should be considered as included within the meaning and purpose of the act.

However, the appellant earnestly contends that the "agreement" here in question at least amounted to an "investment" contract. But it has been judicially declared (People v. Davenport, 21 Cal.App.2d 292, 69 P.2d 862; Lewis v. Creasey Corp., 198 Ky. 409, 248 S.W. 1046) that in the generic sense of the word every contract is an "investment" contract,—from which declaration it should follow that, when viewed in the light of the surrounding circumstances, the question whether the contract in the instant case is included within the purview of the act would seem necessarily to depend upon the construction which appellate courts of this and other jurisdictions, respectively, have placed upon the several Corporate Securities Acts of the various states, including the construction which those tribunals have placed upon the pertinent terms therein employed, such as "security", "investment" contract, and the like.

In 37 Corpus Juris, at page 275, it is said: "The term 'securities' as used in these [Blue Sky] laws, means written assurances for the return or payment of money, evidences of indebtedness, except where special definitions are given by the statutes. Thus under some statutes, it includes any certificate or instrument issued and sold or offered to the public, evidencing *a right to participate in the profits or earnings or the distributions of the assets* of a business carried on for profit, or the shares or other interests or rights into which the property of companies or rights of members thereof are divided, and all certificates and other instruments issued by them or under their authority evidencing or representing such shares, interests, or rights. It means the investment of funds *in a designated portion of the assets and capital of a concern, with a view of receiving a profit through* *the efforts of others than the investor;* and in this sense includes what are termed 'security' or 'investment' contracts or 'speculative securities'. But it does not extend to ordinary commercial contracts, *nor does it include interest income from the lending of money,* or the profits which one might make by his own efforts as the result of any ordinary commercial contract." (Emphasis added.)

In the case entitled Creasy Corp. v. Enz Bros. Co., 177 Wis. 49, 187 N.W. 666, 667, wherein the Wisconsin act, analogous to the one involved here was under discussion, the court pointed out that the act, St.1919, § 1753—48(c) read as follows: "'"Security" or "securities" means and includes any bonds, stocks, notes or other obligations or evidences of indebtedness or of title which constitutes evidences of, or is secured by, title to, interest in or lien upon any or all of the property or *profits* of such company.'" It was there contended that a contract of membership in an association, which gave the member the right to purchase goods from the association at a small stipulated percentage above cost, *but which gave no other interest* to the member in the association, was an obligation for the sale of which a permit was required under the Blue Sky Law, and that the contract in question was included within the term "or other obligations" mentioned in the statute. In *negativing* this contention the court directed attention to the fact that *"The member acquired no rights either in the capital or profits of the company"*, and said that "It may be argued that in one sense every contract is a security, because it guarantees to the parties thereto something of value. But, as before stated, the Blue Sky Law * * * was enacted for the purpose of protecting against the sale of worthless money obligations, and *not* against entering into *other* contracts where *service* is to be rendered, as here, or other obligations are incurred that do not partake of the sale of securities, *or of a sharing in either the capital or profits of a company."* (Emphasis added.)

And in the case entitled In re Waldstein, 160 Misc. 763, 291 N.Y.S. 697, 700, in defining the term "security" the court said, "The term 'security' has no exactly defined legal definition. Generically, the word has reference to written instruments, usually for the payment of money or evidences of a debt, and being more than a mere promise of the debtor of a general liability on his part, but having as collateral to it a pledge of property or some additional obligation. * * * Those instruments, however, secured or unsecured, which are used for the purpose of financing enterprises and promoting a distribution of rights in or obligations of such enterprises, and which are designed as a means of investment, are termed securities."

In the case entitled Lewis v. Creasey Corporation, 198 Ky. 409, 248 S.W. 1046, 1048, the corporation operated wholesale grocery houses in the different states of the Union. It sold "service contracts" to retail dealers, for which it charged $300, and upon payment of such sum obligated itself to the purchaser of the contract to furnish him with groceries for his store for the period of twenty years at a five per cent increase of the original costs to the Creasey Corporation. The latter contended that the contract did not fall within the provisions of the act (The Kentucky Blue Sky Law) there involved. The act provided that every person who sold "any contract, stock, bonds or other securities issued by him" Ky.St.1922, § 883e-2 was required to obtain a permit for such sale. In construing that language, the court adverted to the fact that in other sections of the act following the one under review, the transactions covered by the statute were referred to as "securities" or as "other securities", and said, "* * * it is made perfectly plain to our minds from a consideration of the whole statute that the character of transactions that the Legislature had in mind, and to which it made its terms applicable, are what is ordinarily understood by the term 'security contract' or 'securities,' and that it never contemplated lodging the power or jurisdiction in the hands of the administrator of the statute to supervise or in any wise regulate all, or any, ordinary commercial contracts between members of society. No such universal guardianship was ever intended (if indeed such a sweeping regulation would be constitutional), howsoever much it might be beneficial in some instances. * * *" The court there proceeded to say, "Other authorities give a similar definition to the term, and *it necessarily means the investment of funds in a designated portion of the assets or capital of a concern, with the view that the latter by using, and operating with, the investment will earn a profit for the investor.* * * * but its definition *does not include interest income from the lend-*

*ing of money,* or the profits which one might make by his own efforts as the result of any ordinary commercial contract which he might enter into. * * * We, therefore, conclude as the cases referred to hold, that the primary purpose of Blue Sky Laws is to protect investors from investments in securities whereby *a profit is promised* and expected without any active efforts on the part of the investor, and which scheme contemplates that the company or individual who receives the investment will employ it himself or itself in such a manner *as to reap a profit to the holder of the sold security;* and that it *was not* intended to apply to contracts containing mutual obligations, such as are daily entered into in commercial life, and *from which a profit can only be reaped by the uses which the investor alone makes of them.* In one sense of the word every contract is an investment by the parties thereto. * * * Surely, it cannot be said that the Legislature intended to vest the Banking Commissioner with supervision of all sorts of contracts, though involving the idea of investment, as we have seen, and with power to withdraw the right to make contracts if, perchance, he concluded that one or the other party had been defrauded or that the particular class of contracts possessed the potentialities for the commission of fraud." (Emphasis added.)

In the case entitled Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 51 P.2d 73, 76, the same general principles enunciated in the foregoing cases were expressed by this court. Therein lessees under an oil and gas lease made assignments of percentages of oil and other substances to be produced during the lease; but it was not therein contemplated that the lessees and the assignees of such percentages of oil would be tenants in common in the rights conferred by the lease, nor that the assignees would be permitted to drill for or to produce oil, nor that they would have any voice in the operations. In holding that such assignments were "securities" within the meaning of the act, this court said: "Instruments such as those in * * * the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right *to share in the profits* or proceeds of a business enterprise or venture to be conducted by others. * * * In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, *in the profits* or proceeds of which the purchasers were to share." The court went on to say that "such interests are generally declared to be investment contracts, which are included in the definition of 'security' in the Blue Sky Law of this and other states * * *." (Emphasis added.)

[5, 6] The foregoing authorities serve to point the distinction between those transactions contemplated by the act, and the contract involved in the instant case, where the only (asserted) *"profit"* contemplated by the alleged purchaser of the "security" *was seven per cent interest on deferred payments of the purchase price.* All he had a right to expect by the transaction *was the payment of the agreed purchase price at the times stipulated,* plus the *interest* therein provided for. And as shown by the authorities herein cited, the expectation of the mere payment of *interest* does not transform the transaction into an "investment" contract within the meaning of the act. Lewis v. Creasey Corp., 198 Ky. 409, 248 S.W. 1046; State v. Whiteaker, 118 Or. 656, 247 P. 1077; 37 C.J. 275. Nor was the seller of the certificate (the alleged purchaser of the "security") *given any interest in any portion of the business.* Under the terms of the contract *he had a right to be paid whether the business prospered or not,* and, in the event of respondent's death, was even protected in the matter of payment by life insurance. Under those circumstances, the use which the respondent may have intended to make of the certificates, or their monetary value, would seem to be immaterial.

It follows from the foregoing discussion that, "looking through form to substance", the instant transactions were not of that character which the legislature intended should fall within the inhibitions of the act.

The judgment is affirmed.

33 Cal.App.2d 321

## WOODMAN et al. v. PACIFIC INDEMNITY CO.

Civ. 2405.

District Court of Appeal, Fourth District, California.

June 12, 1939.

As Amended, June 13, 1939.

**1. Insurance** 🔑435

Under liability policy naming Boy Scout council and scout masters as assured, purpose of provision that policy should extend to cover, as additional assured, other persons donating to Boy Scout council use of automobiles providing that council or authorized person should accept use of automobile and make record of name of owner and date of acceptance with time and purposes of use of automobile, was to extend the protection of the policy to others than the named assured.

**2. Insurance** 🔑435

Under liability policy naming Boy Scout council and scout masters as assured, liability of insurer for amount of judgment against scout master was not affected by condition prescribed by provision of policy extending coverage, as additional assureds, to persons donating automobiles to Boy Scout council without charge since scout master was named assured under policy.

**3. Appeal and error** 🔑1097(1)

The doctrine of the law of the case persists as a general rule of practice and procedure, notwithstanding modern tendency of reviewing courts to raise exceptions thereto, particularly in cases where strict adherence to principle would produce manifestly unjust results.

**4. Appeal and error** 🔑1097(1)

When adjudication is made on certain state of facts, there must be substantial identity of facts on subsequent appeal in order that doctrine of law of case shall be applicable.

**5. Appeal and error** 🔑1099(3)

In action against insurer on liability policy naming Boy Scout council and scout masters as assured, to recover amount of judgment obtained against scout master, decision of Court of Appeal on prior appeal as to whether judgment in original case was rendered against scout master personally and not as scout master within coverage of policy became the "law of the case" which was binding on Court of Appeal on subsequent appeal.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

**6. Insurance** 🔑616½

In action against insurer under liability policy, naming Boy Scout council and scout masters as assured, to recover amount of judgment obtained against scout master, showing that jury found for Boy Scout organization against scout master in prior action could not be taken as conclusive that scout master was not acting in official capacity so as not to be covered by policy.

**7. Appeal and error** 🔑1170(3)

In action against insurer under liability policy naming Boy Scout council and scout masters as assured, to recover amount of judgment obtained against scout master, judgment for plaintiff could not be reversed because of defects, if any, in allegations of complaint relating to capacity in which judgment was recovered against scout master and performance of terms of policy, where attorneys representing insurer had represented scout master in damage action, question of capacity in which scout master acted had been thoroughly litigated in both actions, and insurer was not misled or surprised by defects, if any. Const. art. 6, § 4½.

**8. Appeal and error** 🔑1099(6)

In action against insurer under liability policy naming Boy Scout council and scout masters as assured, to recover amount of judgment obtained against scout master, holding of reviewing court on prior appeal that complaint sufficiently alleged that scout master was acting as such at time of acts complained of established "law of the case" which was conclusive on subsequent appeal.

**9. Insurance** 🔑631

In action against insurer under liability policy naming Boy Scout council and scout masters, as assured, to recover amount of judgment obtained against scout master, complaint was not required to include allegations relating to clause of policy giving injured party right of action against insurer subject to conditions of policy which did not relate to any duty to be performed by scout master or anyone else.

**10. Insurance 🔑634(1, 2)**

As respects pleading, the giving of timely notice of an accident and of co-operating in its investigation and defense of action based on it are not conditions precedent to validity and enforceability of liability policy.

**11. Insurance 🔑514½, 539(5)**

Insured's breach of obligation to give timely notice of accident and to co-operate in investigation of accident and defense of action based on it may under certain circumstances relieve insurer from liability under liability policy.

**12. Insurance 🔑640(2)**

In action on liability policy, insured's breach of duty to give timely notice of accident and to co-operate in its investigation and defense of action is matter of defense required to be pleaded by insurer.

**13. Pleading 🔑67**

The plaintiff in his complaint is not required to anticipate defense, plead conditions subsequent to right of recovery, or nonperformance of negative prohibited acts.

**14. Appeal and error 🔑1039(2)**

In action against insurer under liability policy naming Boy Scout council and scout masters as assured, to recover amount of judgment obtained against scout master, judgment for plaintiff could not be reversed because of failure of complaint to allege performance of notice of accident and co-operation clauses of policy, especially in absence of intimation in answer that scout master failed to give timely notice of accident or to co-operate with defendant in defending the action.

**15. Insurance 🔑665(4)**

Evidence justified judgment against insurer on liability policy naming Boy Scout council and scout masters as assured, for amount of judgment obtained against scout master on ground that judgment against scout master was obtained by reason of liabilities imposed on him while he was acting as scout master and that he was acting as scout master at time he committed negligent act on which judgment was based.

**16. Charities 🔑46**

A master of a troop of the Boy Scouts of America may be liable for damages caused by his negligent conduct in scout activities.

**17. Insurance 🔑435**

Insurer under liability policy naming Boy Scout council and scout masters as assured could not avoid liability for amount of judgment obtained against scout master on ground that individual engaged in Boy Scout activities could not be held liable in action based on negligence especially in view of fact that, if scout master were not liable, insurer gave no consideration to Boy Scout organization which paid premium for policy.

**18. Insurance 🔑435**

Under liability policy naming Boy Scout council and scout masters as assured, a paragraph calling for description of property covered which included questions relating to location of insured premises by street and number, town and state, nature of occupancy, part occupied by insured, and elevators, which were designated by letters A to G respectively, under which appeared typewritten words "(a) Operations Usual to the Conduct (b) Of a Boy Scout Council Operating (c) From Various Locations. (d) None," was to be construed as provision that premises insured included those premises where operations usual to conduct of Boy Scout council operating from various locations might be conducted; the word "none" referring to question relating to elevators.

**19. Insurance 🔑146(3)**

Any ambiguity in an insurance policy prepared by the insurer must be strictly construed against the insurer.

**20. Insurance 🔑146(3)**

Where ambiguity in insurance policy prepared by insurer is subject to two constructions, the construction most favorable to the insured must be adopted.

**21. Insurance 🔑435**

Under liability policy naming Boy Scout council and scout masters as assured and designating as property covered by insurance premises where operations usual to conduct of Boy Scout council operating from various locations might be conducted, loss resulting from accident which occurred while members of Boy Scout troop under direction of scout master were hauling stones for construction of fireplace at scout barracks was covered by policy.

**22. Insurance 🔑435**

Under liability policy naming Boy Scout council and scout masters as assured and providing coverage for bodily injuries sustained on premises described in application as those where operations usual to conduct of Boy Scout council operating from various locations might be conducted, insurer could not defeat liability for injuries resulting from operation of automobile furnished by scout master and used in Boy Scout activities, because no record of loan of automobile was made as required by clause of endorsement referring to paragraph of application describing premises, since such clause of endorsement was only operative where injury was sustained elsewhere than on insured premises.

**23. Insurance ⇐146(2)**

Under liability policy naming Boy Scout council and scout masters as assured, paragraph of indorsement referring to clause describing premises covered by policy and exempting from liability loss caused by automobile loaned to assured where no record of loan was kept was required to be construed with all other provisions of policy, and particularly with paragraph providing coverage for bodily injuries sustained on premises described in paragraph of application.

**24. Insurance ⇐435**

Under liability policy naming Boy Scout council and scout masters as assured, scout master neither "owned," "hired," or "maintained" truck, which belonged to school district and was taken by scout master for use of Boy Scouts as a trespasser, within provision of policy exempting insurer from liability caused by automobile owned, maintained, or hired by assured unless registered in Boy Scout records, notwithstanding that scout master had possession of truck for school district and either personally or through students in his classes kept it running since in so doing he was acting for the school district.

[Ed. Note.—For other definitions of "Hire; Hiring," "Maintained" and "Own," see Words & Phrases.]

**25. Insurance ⇐146(3)**

The provisions of an insurance policy prepared by the insurer must be strictly construed in favor of the assured.

---

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action on a liability policy by Rena Woodman and another against Pacific Indemnity Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Sarau & Thompson, of Riverside, for appellant.

Fred L. Hamblin and Albert H. Ford, both of Riverside, for respondents.

MARKS, Justice.

This is an action to recover from the defendant insurance carrier the total amount of a judgment rendered against W. J. Austin for damages suffered by plaintiffs in an automobile accident. See Woodman v. Hemet Union High School District, 136 Cal.App. 544, 29 P.2d 257. Plaintiffs had judgment in this action on the insurance policy and this appeal followed. This case has been before us once before on appeal (Woodman v. Pacific Indemnity Company, 23 Cal.App.2d 135, 72 P.2d 256), where a judgment for defendant was reversed. We will not repeat the facts set forth at length in the first cited case.

The facts of this case are not in serious dispute. The controversy here revolves around the terms and conditions of the insurance policy issued by defendant and the proper construction to be placed upon them. Therefore, it is necessary for us to detail those terms and conditions with considerable precision.

The effective date of the policy was June 12, 1930. Its term was for one year. The premium had been paid and it had not been cancelled on February 9, 1931, the day Donald Woodman was injured. The named assureds were "Riverside County Council of Boy Scouts of America and/or its sponsoring organizations, committeemen, and Scout Masters". W. J. Austin was at all times material here, scout master of Hemet Troop Number 47, a regular Boy Scout troop organized and existing under the Riverside County Council. There were provisions in the policy under which its protection was extended to other unnamed assureds.

The policy contained the following:

"Does Hereby Agree with the Assured named and described as such in the Declarations forming a part hereof, respecting accidental bodily injuries including death at any time resulting therefrom, as follows:

"1. To Insure the Assured against loss by reason of the liability imposed by law upon the Assured for damages on account of such injuries, and to pay and satisfy judgments finally establishing Assured's liability in actions defended by the Company, all subject to the limits expressed in Paragraph 10 of the Declarations; * *

"5. The Foregoing Agreements Shall Apply only to such bodily injuries as are sustained or alleged to have been sustained during the policy period defined in said Declarations by any person, excepting an employee of the Assured while engaged in his employment, as the result of an accident * * *

"(a) Occurring within or upon the premises described in Declaration 4, including the sidewalks or other ways adjacent thereto used or occupied for the purpose described in said Declaration, including injuries sustained elsewhere if caused by an accident originating on said premises, or

"(b) Occurring elsewhere if such injuries are caused by the Assured's employees while engaged in the course of their employment in prosecuting the business or work described in said Declarations and conducted by the Assured at the location specified herein.

"Said Agreements are made in consideration of the Declarations forming a part hereof and of the premium herein provided."

Under the head of "Exclusions" (otherwise referred to as "Conditions") we find the following:

"B Unless otherwise specifically written in or endorsed on this policy, said policy shall not cover bodily injuries or death * * * (4) sustained elsewhere than upon the insured premises if caused by any draught animal, automobile, aircraft or other vehicle owned, maintained, used or hired by the Assured, including the loading or unloading thereof; * *."

In the application (sometimes called the Declaration) for the policy, of which it is made a part, we find the following:

"4. A complete description of the premises and each elevator covered by this policy, the nature of occupancy, the business or work carried on by the Assured within or upon the said premises, the premium rate or rates applicable and the amount of premium are given hereunder.

"(A) Location of Insured premises by Street and Number, Town and State. (B) Nature of Occupancy. (C) Part occupied by Assured. (D) Elevators; Describe each elevator separately giving a designating number for identification (E) Classified Type (F) Motive Power (G) Number of Landings.

"(a) Operations Usual to the Conduct

"(b) Of a Boy Scout Council Operating

"(c) From Various Locations.

"(d) None."

Among the endorsements on the policy there appear the following:

"In consideration of the premium charged for this policy, it is understood and agreed: * * *

"4. Clause 4 of Condition (B) If (exemption from liability) caused by any automobile or other vehicle owned, maintained, or hired by any of the Assureds, including the loading or unloading thereof, unless such Assureds donate the use of their automobiles and such automobiles are accepted and duly recorded as set forth in paragraph 7 of this endorsement and filed with the Scout Executives of the Riverside County Council of Boy Scouts of America. * * *

"7. It is also understood and agreed that the policy shall extend to cover as Additional Assureds, such other persons as may donate to the Council without charge, the use of automobiles, providing that the Council or a person authorized by them, shall accept the use of such automobile and make due record of the name of the owner of the automobile, the date of its acceptance, and the time and purposes of its use."

[1, 2] It is conceded that W. J. Austin, being a scout master, is a named assured under the clear terms of the policy. Defendant argues that as the use of the automobile which caused the injury to Donald Woodman was donated without charge to the council; that as there was no formal acceptance of its use nor record made of the name of the owner, the date of its acceptance or the time and place of its use, no liability can arise because of paragraph "7" of the endorsements last above quoted. This argument overlooks the clear purpose of paragraph "7" of the endorsements, which is to extend the protection of the policy to others than a named assured. As the liability of no other than a named assured is here involved, the lack of applicability of the endorsement is apparent and no further attention will be given to this argument.

Defendant urges that the judgment in the original case was rendered against W. J. Austin personally and not as a scout master; that this judgment is final and cannot now be questioned; that, therefore, no liability attaches under the policy which only indemnified W. J. Austin, the scout master.

The same question was presented on the former appeal in this case (Woodman v. Pacific Indemnity Co., supra), and was decided as follows [23 Cal.App.2d 135, 72 P.2d 257]:

"The controlling question presented is whether the court erred in refusing to permit the appellants to introduce evidence which was offered to the effect that Austin was acting as scoutmaster at the time of the negligent acts, for which he was held liable. The respondent's position is thus stated: 'The judgment in the former case is now final, and we submit that the court here can look only to the judgment, and that the judgment on its face shows that it is against Austin in his individual capacity and not against him in any representative capacity.' The trial court adopted this theory that the prior judgment was controlling and that the matter of the capacity in which Austin was acting at the time could not be gone into in this action, since it did not appear on the face of the judgment.

"In our opinion, the court erred in rejecting the proffered evidence. A judgment had been entered against Austin, and the only real question in the present action is as to whether he was covered under the policy which had been issued by the respondent. If, in committing the acts of negligence, he was acting as a scoutmaster, he was covered as a member of a class named among the assured. Whether or not he was so covered was not material in the other action. The fact that the jury found in favor of the two Boy Scout organizations cannot be taken as a finding that Austin was not acting at the time as a scoutmaster, as he might have been so acting without imposing liability on those organizations. Young v. Boy Scouts of America, 9 Cal.App.2d 760, 51 P.2d 191. Under the circumstances, the judgment entered against Austin had no bearing on the question as to whether he was acting as scoutmaster at the time, and is not conclusive on the issue here raised as to whether he was included as an assured under this policy.

"In the present action the question of whether or not Austin was acting in the capacity of a scout master when he performed the acts which constituted negligence is both material and essential, in order to determine whether or not he was included in the classes named as the assured in the policy and covered thereby. In the ordinary action judgment might be obtained against a defendant personally although he was, at the time, acting as the agent of another. If his principal was then covered by a policy such as the one involved here the judgment-creditor could sue the insurer and would then be entitled to show, if such was the fact, that the agent was included in a class named among the assureds in the policy and was also covered. While the judgment with which we are here concerned was against Austin personally, the appellants were entitled to show, if they could, that he was covered by this policy. The former judgment was not conclusive on that point * * *."

[3, 4] The question of when a decision establishes the law of the case and is binding on subsequent proceedings in the same case is considered in Haase v. Central Union High School Dist., 27 Cal.App.2d 319, 80 P.2d 1044, 1046, where it was said: "Various reasons have been assigned by the courts for the existence of the doctrine of the 'law of the case'. Estate of Baird, 193 Cal. 225, 233, 223 P. 974; 2 Cal.Jur., p. 949. No useful purpose would here be served by their restatement. It is sufficient for the purpose of this opinion to recognize that the doctrine is established as a legal principle and that, despite the modern tendency of reviewing courts to raise exceptions thereto, particularly in cases where strict adherence to the principle would produce manifestly unjust results, the doctrine has nevertheless not been abandoned but persists as a general rule of practice and procedure. United Dredging Co. v. Industrial Acc.Com., 208 Cal. 705, 712, 284 P. 922. There is, however, a settled limitation upon the doctrine which must be taken into account. This qualification is that when an adjudication is made upon a certain state of facts there must be substantial identity of facts on a subsequent appeal in order that the doctrine shall be applicable. Hoffman v. Southern Pacific Co., 215 Cal. 454, 457, 11 P.2d 387; Sheets v. Southern Pacific Co., 1 Cal.2d 408, 411, 35 P.2d 121."

[5, 6] Defendant is asking us to reconstrue the identical judgment, and to reconsider the same question both of which were before the court and were considered and construed on the former appeal. There is an exact identity of facts. The identical question we are here asked to consider, having been decided, we are bound by our former decision which has become the law of the case. In this connection we desire to state that we have carefully reviewed the arguments of counsel and the decisions cited and are convinced that our former conclusions were correct; that the judgment against Austin was not necessarily rendered against him as an individual, as distinguished from Austin the scout master, and that the question of the capacity in which Austin was acting in connection with the injury to Donald Woodman is open for decision in the instant case.

[7] Defendant next urges that the complaint fails to state a cause of action against it, because, (1) the allegation that the former judgment "was obtained by reason of the liability for said injuries imposed by law upon the said W. J. Austin while acting as such Scout Master" is nothing more than a conclusion of law, and (2) that there is no allegation in the complaint of performance by Austin of the terms of the policy or any allegation of an excuse for performance.

In addition to the allegation of the complaint which we have just quoted it is alleged that at all times material to the cause of action W. J. Austin was the regularly appointed, qualified and acting scout master of Hemet Troop Number 47 of the Boy Scouts of America.

If we assume, without holding, that the quoted allegation of the complaint is technically defective we cannot see how defendant suffered other than a technical disadvantage therefrom. No demurrer was interposed to the complaint. The question of its sufficiency was first raised during the trial on objections to the introduction of evidence.

The attorneys who are representing defendant in the instant action represented Austin and the other Boy Scout executives in the trial of the damage action, and at least in the defense of Austin, they acted on behalf of the Pacific Indemnity Company. The question of the capacity in which Austin acted in connection with the accident in which Donald Woodman was injured was thoroughly litigated there. The same attorneys appeared in the appeal of that case. On the first appeal of the instant case that question was thoroughly argued. In the trial which resulted in the judgment from which this appeal was taken, both parties introduced all of the evidence they desired to produce on the question, which was thoroughly litigated. Defendant was neither misled nor surprised by reason of the defective allegation, if it be defective. We cannot see how any prejudice resulted.

Section 4½ of article VI of the Constitution prohibits us from reversing a judgment "on the ground * * * of the improper admission or rejection of evidence, or for any error as to any matter of pleading * * * unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice". Under the facts here we cannot conclude that the error, if any, in the complaint resulted in a miscarriage of justice. We are therefore precluded by the Constitution from reversing the judgment on that ground.

[8] Furthermore, in speaking of the sufficiency of the pleading on the former appeal this court said, 23 Cal.App.2d 135, 72 P.2d 256, 257: "The complaint in this action sufficiently alleged that Austin was scoutmaster of this particular troop and acting as such at the time of the acts complained of in the original action." This holding probably established the law of the case on this question.

Defendant next urges that the complaint failed to allege performance of the terms of the policy by Austin. In this subdivision of its brief defendant fails to point to any specific provision of the policy to which the argument and the cited cases refer. Cases are cited under this heading which hold in effect that in suing the insurance carrier upon a judgment against an assured the injured party stands in no better position than the assured would have occupied had he paid the judgment and brought suit against the insurance carrier. See, Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13; Valladao v. Firemen's Fund Indemnity Co., Cal.Sup., 89 P.2d 643.

[9] Defendant then cites cases involving the bankruptcy or insolvency of the assured clauses of policies. This clause of the policy before us gives the injured party

the right of action, on a judgment obtained against the insurance carrier, subject to the terms and conditions of the policy and not exceeding the total amount of liability, regardless of the insolvency or bankruptcy of the assured. Under the circumstances of this case we cannot understand the relevancy of these citations. As this clause does not relate to any duty to be performed by Austin or anyone else, no allegation concerning it should be necessary in the complaint on the judgment.

[10-14] Defendant cites other cases under the notice of accident and cooperation clauses of policies. Donald Woodman was injured on February 9, 1931. Defendant through its attorneys wrote a letter to Austin offering to conduct his defense of the damage action but stipulating that such defense should not be construed as a waiver of any term or condition of the policy. In the damage action Austin and the other Boy Scout executives were defended by these same attorneys who signed the letter to Austin and who are attorneys for defendant here. There is no intimation in the answer that the assured failed to give timely notice of the accident or failed to cooperate with defendant in defending the action.

Certainly the giving of timely notice of an accident and of cooperating in its investigation, and the defense of an action based upon it, are not conditions precedent to the validity and enforceability of an insurance policy. Of course, under some circumstances breach of these obligations by an assured may relieve the insurer from liability. Such a breach is a matter of defense and should be pleaded by defendant. The plaintiff in his complaint is not required to anticipate a defense. The rule announced in Arnold v. American Insurance Co., 148 Cal. 660, 84 P. 182, 183, 25 L.R.A.,N.S., 6, is applicable here. The Supreme Court there said: "Certain conditions subsequent to the right of recovery, matters of defense, the nonperformance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff." See, also, 14 Cal.Jur. 609, and cases cited.

[15] Defendant next urges that two findings of fact are not supported by any sufficient evidence. The first of those findings is to the effect that the judgment in the damage action was obtained against Austin by reason of the liabilities imposed by law upon him while he was acting as scout master. The second finding is to the effect that Austin was acting as scout master at the time he committed the negligent act upon which the judgment in the damage action was based.

The evidence on which those findings are based may be briefly summarized as follows: That Hemet Troop Number 47 possessed a scout barracks which was used for its usual troop activities; that a stone fireplace was being built on the property to be used by the troop in its usual activities; that the project had been approved by scout executives; that the actual work of building the fireplace was being done by Austin and the members of the troop as a scout activity; that stones of a certain size were required for the work; that such stones could be obtained from a river bed some distance from the barracks; that at a troop meeting Austin explained the need of the stones and where they could be found; that he informed the members present that he could furnish a truck in which to haul the stones; that he asked for volunteers to go after them; that Donald Woodman was present at this meeting; that Bob Ogleby volunteered to drive the truck; that Bob was to obtain other troop members to assist in the work; that Austin furnished the defective truck; that this truck belonged to the Hemet Union High School District and is described in detail in Woodman v. Hemet Union High School Dist., supra; that the accident happened and Donald Woodman was injured on one of the trips for the stones.

The foregoing evidence is amply sufficient to justify the challenged findings. The fireplace was being constructed on ground where the usual troop activities were carried on and was to be used in those usual activities. The truck was furnished by Austin to members of the troop and was used in furthering an approved troop activity. It was being used to promote that activity at the time of the accident. Austin was actively engaged in carrying out that activity at the time he furnished the truck and at the time of the accident. His only purpose in furnishing the truck and arranging the trips for the stones was to assist in the completion of the fireplace. He had no other interest in the undertaking than as scout master. The project was no concern of the Hemet Union High School nor of Austin as one of its teachers. Any other inference drawn from the evidence than that set forth in the findings would have been contrary to all of the evidence in the case. Because Austin wrongfully delivered the possession of the school truck, which was entrusted to him by the school, to the Boy Scouts to be used in a scout activity cannot change the capacity in which he acted in permitting the scouts to use the truck for scout purposes.

The foregoing conclusion renders it unnecessary to separately consider the fourth specification of error, that the findings of fact do not support the conclusions of law. As the two challenged findings of fact are supported by the evidence, those findings support the questioned conclusions of law.

Defendant states its fifth specification of error as follows: "Assuming that W. J. Austin was acting in his capacity as scout master, no court has ever held the Boy Scouts of America or any subordinate unit or individual engaged in boy scout activities liable in an action based on negligence."

Defendant cites the case of Young v. Boy Scouts of America, 9 Cal.App.2d 760, 51 P.2d 191, as its sole authority in support of the foregoing assertion. That case not only fails to support the proposition but is direct authority contrary to the only part of it with which we are here concerned.

[16] In that case the plaintiff sued the Boy Scouts of America, a corporation; Henry Webster, a scout master, and others for damages suffered by Harold P. Young which resulted from his injury while engaged in a scout activity. The defendants interposed demurrers to the complaint which were sustained and a judgment was entered in their favor. The judgment in favor of the Boy Scouts of America was sustained for reasons clearly set forth in that opinion. It was reversed as to Henry Webster, the scout master, and the other individual defendants and sent back for trial against them on the merits. This is a direct holding that a scout master may be liable for damages caused by his negligent conduct in scout activities.

[17] In passing, it might not be out of place to remark that if no liability for any act of negligence can attach to the "Riverside County Council of Boy Scouts of America and/or its sponsoring organizations, committeemen and Scout Masters", the named assured in the policy in question here, as contended by defendant, then it gave no consideration to those organizations which paid the one hundred fifty dollars premium for the policy.

[18] Defendant next urges that the negligent acts of Austin were not covered by the insurance policy. This contention is based upon the argument that the negligent acts of Austin, and the accident, did not occur on the insured premises as required by sub-paragraph four of paragraph "B" of the endorsements, which we have quoted, and which by its terms is limited by the definition of those premises in paragraph four of the application which we have also quoted exactly as it appears in the record. The answers given to the questions propounded in the second sub-paragraph of paragraph four of the application, as those answers were copied in the record, are so meaningless, that we sent for the original exhibit, which we now have before us. Paragraph four there appears as follows:

"4. A complete description of the premises and each elevator covered by this policy, the nature of occupancy, the business or work carried on by the Assured within or upon the said premises, the premium rate or rates applicable and the amount of premium are given hereunder.

---

"(A) Location of Insured Premises by Street and Number, Town and State.

"(B) Nature of Occupancy—(C) Part Occupied by Assured.

(D) Elevators: Describe each elevator separately giving a designating number for identification—(E) Classified Type—(F) Motive Power—(G) Number of Landings.

---

"(a) OPERATIONS USUAL TO THE CONDUCT

"(b) OF A BOY SCOUT COUNCIL OPERATING

"(c) FROM VARIOUS LOCATIONS.

"(d) NONE."

In the above quotation the matter above the second line is a part of the insurance policy's printed form while that below the second line is typewritten. The typewritten sentence commencing with the word "OPERATIONS" and ending with the word "LOCATIONS" is one sentence in capital letters without any punctuation mark except the period after the final word. This sentence is an answer to the following above-quoted questions, namely, (A) Location of insured premises * * *—(B) Nature of occupancy—(C) Part occupied by assured. The last typewritten answer, "(d) NONE", is evidently a reply to the prior questions "D", "E", "F" and "G".

The fair construction to be put on these questions and answers, and the information conveyed by them to defendant, may be paraphrased as follows: You are insuring the named assured against loss imposed by law to any person arising from injury occurring on the premises occupied by us which include those premises where operations usual to the conduct of a Boy Scout Council operating from various locations may be conducted. The premises of the insured include any location on which any usual operation of scouting may be conducted.

[19, 20] If defendant is dissatisfied with this construction, which we believe reasonable, it has only itself to blame, for it prepared the document. It is well settled that any ambiguity in an insurance policy prepared by the insurer must be strictly construed against the insurance company causing it. If any such ambiguity is subject to two constructions the one most favorable to the assured must be adopted. Welch v. British American Assur. Co., 148 Cal. 223, 82 P. 964, 113 Am.St.Rep. 223, 7 Ann.Cas. 396; Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668.

[21] It follows that as the description of the premises of the assured covered all locations where the usual operations of a Boy Scout troop were conducted, the place where the negligence of Austin occurred, and the place where the accident happened in which Donald Woodman was injured, were part of the premises of the assured, and as there was no exception in the policy relieving the insurer from liability under the facts before us, the loss resulting from the accident was covered by the policy.

Defendant urges that as the automobile was furnished by Austin, a named assured, and as no record of its loan, the name of the owner, the date of its acceptance, and the purpose of its use was made in the Boy Scout records as required by paragraph four of the endorsements which we have already quoted no liability arose under this policy.

[22] This paragraph refers to and is subject to the provisions of clause four of the exclusions or conditions which we have quoted. This clause is only operative where the injury is "sustained elsewhere than upon the insured premises". As we have held that the injury occurred on the insured premises this argument must fail.

[23] We reach this conclusion because paragraph four of the endorsements must be read and construed in connection with all of the other provisions of the policy and particularly with sub-paragraph "(a)" of paragraph five of the policy which provides coverage for bodily injuries sustained upon the premises described in paragraph four of the application or declaration.

If we are wrong in this conclusion there is another controlling ground for holding that the provisions contained in paragraph four of the endorsements do not apply to the facts of the case. That paragraph, taken by itself, exempts the insurer from liability "caused by any automobile * * * owned, maintained, or hired by any of the assureds" unless the automobile be registered in the Boy Scout records as provided in paragraph seven of the endorsements.

[24, 25] Austin furnished the use of the automobile to the Boy Scouts. In taking the automobile for the use of the Boy Scouts we have held that he was in the position of a trespasser. Woodman v. Hemet Union High School Dist., supra. It must be admitted that Austin neither owned nor hired the vehicle. It is urged that Austin "maintained" the vehicle and therefore came within the language of the provisions we are considering. It is true that he had possession of the truck for the school district and either personally or through students in his classes kept it running. In so doing he was acting for the school district. Therefore, it was the school district and not Austin that maintained the truck.

The provisions of an insurance policy, prepared by the insurer, must be strictly construed in favor of the assured. It follows that as the motor vehicle causing the injury was neither "owned, maintained or hired", by Austin the provisions of paragraph four of the endorsements have no application to the facts of this case.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

33 Cal.App.2d 424

## PEOPLE v. WILEY.

Cr. 1680.

District Court of Appeal, Third District, California.

June 19, 1939.

**1. Criminal law 🔑511(2)**

Evidence corroborating testimony of an accomplice is sufficient if it tends to connect defendant with commission of offense, although, standing alone, it would be entitled to little weight, and it is not necessary that testimony of accomplice be corroborated by direct evidence. Pen.Code, § 1111.

**2. Criminal law 🔑511(3)**

The entire conduct of defendant may be looked to for circumstances corroborating testimony of accomplice, and if, from those circumstances, connection of defendant with crime may fairly be inferred, corroboration is sufficient. Pen.Code, § 1111.

**3. Criminal law 🔑511(4)**

In prosecution for burglary against defendant whose nephew had entered house through a window, admission of defendant that he was with nephew on date of crime, and evidence that defendant drove to curb near house at nephew's order, that defendant diverted attention of dog while nephew engaged in commission of crime, and that he waited for nephew and was driving automobile when they were arrested constituted sufficient corroboration of nephew's testimony. Pen.Code, § 1111.

**4. Criminal law 🔑722(3)**

In prosecution for burglary, district attorney's reference to defendant as a dealer in a gambling joint did not constitute prejudicial misconduct on ground that it was not based upon any evidence, where one of witnesses had stated that defendant had been working at gambling joints.

**5. Criminal law 🔑782(5)**

Evidence that defendants left scene of crime very rapidly in an automobile was sufficient evidence of flight to justify instruction on that matter in burglary prosecution, notwithstanding that they drove directly into business section of city.

**6. Criminal law 🔑982**

In burglary prosecution, trial court did not abuse its discretion in denying defendant's motion for probation, notwithstanding that defendant had not been armed, that there was no showing of any prior conviction and that he and his family had resided in city for several years. Pen.Code, § 1203.

**7. Criminal law 🔑982, 1147**

The exercising of power of probation is committed to sound discretion of trial court, and an order denying probation will not be reviewed on appeal in absence of abuse of that discretion. Pen.Code, § 1203.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Harold Wiley was convicted of burglary in the first degree, and he appeals.

Affirmed.

Charles H. Epperson, of Stockton, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant was convicted of the crime of burglary in the first degree by a jury, and appeals from the judgment of conviction entered thereon, and from an order denying his motion for a new trial. Prior to said trial one Richard Odell, the accomplice of defendant, plead guilty to the same charge.

Turning to the facts which were relied upon by the prosecution, it appears that defendant was a man of thirty-four years of age, and Odell, his nephew and accomplice, was twenty-five years old. About 7:30 p. m. on the date of the crime the two men left Odell's home in defendant's car, with defendant driving. They stopped at a couple of bars in the business district of Stockton and had some beer. They then proceeded to drive around the residential section of the city of Stockton until they came to a large residence which was well lighted, and in front of which a number of cars were parked. Odell then said to defendant, "There is a party going on here, and there might be some money inside." Defendant said nothing but pulled over to the curb near the residence. Odell then stepped out of the car and proceeded to enter the yard in which the house was situate. He was suddenly confronted by a very large dog which blocked his passageway, and he called to defendant that "there was a dog which would have to be taken care of". Defendant replied that he was not a very good hand with dogs, but he finally got out of the car and managed to lead the dog across the street. Odell then entered the yard and walked to the rear of the house. He entered the house through a window, and just as he did so, a maid opened the door of the room in which he was standing, and he immediately proceeded to leave by the same window, went out to the sidewalk, jumped into the automobile and started off. He drove around the block, came back and took defendant into the car. They drove into the main business section of Stockton, and while passing the hall of justice they were apprehended by the police.

Defendant took the witness stand and disclaimed any connection whatever with the crime. He claimed a total absence of any criminal intent. According to his version of the affair Odell had approached him early in the evening and stated that he wished to find a man who owed him (Odell) $8. Appellant testified that he agreed to take his car and drive Odell in search of the man who owed the money, and that when they reached the residence in question, Odell stated that he thought the man he was looking for was inside the house, and it was for this reason that they stopped near the residence.

It is contended by appellant that he was convicted upon the uncorroborated testimony of his accomplice (sec. 1111, Pen. Code), and that the judgment must therefore be reversed.

[1] The rule governing the point in question is stated in People v. Yeager, 194 Cal. 452–473, 229 P. 40, 49, to be as follows: "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

[2, 3] It has also been held that the "entire conduct of defendant may be looked to for corroborating circumstances of testimony of accomplice, and if, from such circumstances, the connection of accused with crime may fairly be inferred, corroboration is sufficient". People v. Nikolich, 93 Cal.App. 356, 269 P. 721. We are of the opinion that there is ample evidence in the case to bring it within the rule above stated. This corroboration consists in the following facts and circumstances: Admission of the defendant that he was with Odell; that they drove out to the residential section; that Odell made a remark about stopping at this house; that Odell said, "Pull in here," and defendant said, "O.K."; that the dog came out, and that defendant admitted that he said, "What in the hell do you want me to take the dog for?"; that defendant got out of the automobile and proceeded to divert the attention of the dog while Odell engaged in the commission of the crime; that defendant waited around until Odell came out; and that when they left the scene of the crime, he took the wheel and was driving the automobile at the time when he and Odell were arrested. We are therefore of the opinion that the contention is without merit.

[4] It is next contended that the district attorney was guilty of prejudicial misconduct. One of the instances relied upon arose in the argument made by the district attorney to the jury. In that argument the district attorney referred to the defendant as a "dealer in a gambling joint". It is contended that this reference to the defendant was not based upon any evidence produced at the trial, and was highly prejudicial. Turning to the record, however, we find some support for the reference thus made to defendant. Odell testified, in answer to a question concerning his reason for going to the place where beer was sold: "Well, Mr. Wiley had been working at the gambling joints up town, and he wanted to find out if there was any news of their opening." It thus appears that the district attorney would have been fully justified in making a statement that the defendant worked at a gambling joint, and we are at a loss to see how any additional prejudice would arise by reason of the fact that he was referred to as having been a dealer in a gambling joint. The difference is one of words rather than one of substance. The implications—if there be any—are not very widely separated. Several other occasions are pointed out wherein it is contended by appellant that the conduct of the district attorney was prejudicial. We have examined all of them, and we cannot say that the district attorney went beyond the bounds of propriety and fairness, or that he did anything to wilfully injure or prejudice the defend-

ant in the eyes of the jury. As stated in People v. Sprado, 72 Cal.App. 582, 237 P. 1087, 1092: "Of course it is to be said that in all warmly contested cases, particularly those involving prosecutions under the criminal laws, now and then there will leave the lips of either the judge or district attorney some remark or remarks which should not go before the jury. Unless, however, it can justly be said that such remarks are so grossly improper as irresistibly to lead to no other conclusion than that the rights of the party to an action or the defendant in a criminal case were thereby seriously prejudiced and he therefore denied a fair and impartial trial according to the law of the land, then the result reached below cannot for that reason be set at naught."

[5] It is contended that the court erred in instructing the jury on the law relating to "flight", and the inferences which the jury might draw from the flight of the defendant from the scene of the crime. It is urged that the instruction should not have been given at all, because there was no evidence whatever of flight. We are of the opinion that the trial court was justified in so instructing the jury. While we do not regard the evidence of flight as very strong or convincing, it nevertheless appears that both the defendants left the scene of the crime very rapidly in the automobile. The fact that they drove directly into the business section of Stockton is not conclusive evidence that they did not attempt to flee from the scene of the crime.

[6, 7] It is finally contended that the trial court erred in refusing to grant probation to the defendant. When the latter was arraigned for judgment, his counsel made a motion for probation, and asked that the matter be referred to the probation officer. The trial court promptly stated that in his opinion the facts of the case did not justify probation, and he thereupon denied the motion. The right to thus summarily deny probation is expressly granted by the provisions of section 1203 of the Penal Code. It is also a well-settled rule that the matter of the exercising of the power of probation is committed to the sound discretion of the trial court, and that an order denying probation will not be reviewed on appeal unless it be shown that there was an abuse of that discretion. The rule governing the entire matter is well summarized in the following excerpt from the case of People v. Blankenship, 16 Cal.App.2d 606–609, 61 P.2d 352, 353: "It must, in the first place, be conceded that the granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court. Section 1203, Pen.Code; People v. Judson, 128 Cal.App. 768, 774, 18 P.2d 379. In the second place, probation is not a right which is given to a defendant in a criminal proceeding who has either pleaded guilty to the commission of an offense or has been duly convicted thereof. It is 'an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted.' People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16; People v. Payne, 106 Cal.App. 609, 613, 289 P. 909, 911. The only right which an applicant for probation possesses is that his petition shall receive consideration by the court. He may not demand clemency as a matter of right. People v. Roach, 139 Cal.App. 384, 387, 33 P.2d 895."

We are free to confess that had the matter been before us, we would have been impelled to grant the motion. The defendant was not armed on the occasion mentioned. He had, so far as this record shows, no prior convictions, and he and his family had resided in Stockton for several years. We feel, however, that the trial court did its duty as it saw it, and we are not at liberty to substitute our own judgment for that of the trial judge. The latter had an opportunity to observe the defendant, and to draw his own conclusions from the testimony and demeanor of the defendant when the latter was before him, and from other facts not here disclosed. We cannot say, under such circumstances, that the trial court abused its discretion in denying the motion, and we are therefore powerless to interfere with the disposition of the matter as thus made.

The judgment and order appealed from are, and each of them is, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

33 Cal.App.2d 395

## WILBUR v. DONOHOE KELLY BANKING CO. et al.

Civ. 11017.

District Court of Appeal, First District, Division 2, California.

June 19, 1939.

**1. Equity** 🔑66

Party refusing to do equity is not entitled to relief in equity court.

**2. Quieting title** 🔑14

A mortgagor cannot quiet his title against the mortgagee without paying the debt secured.

**3. Quieting title** 🔑14

Where lots were sold after default under a trust deed, the mortgagor could not quiet title to lots on ground that sale was invalid because lots were sold separately rather than as a unit as property was described in the trust deed, without paying the debt secured by the trust deed, or otherwise offering to do equity.

◆

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Action to quiet title by Edith M. Wilbur against the Donohoe Kelly Banking Company, Joseph A. Donohoe, John F. Dispaux, and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

W. G. Deal, W. H. Metson, both of San Francisco (P. H. McCarthy, Jr., of San Francisco, of counsel), for appellant.

Luther Elkins, of San Francisco (T. H. De Lap, of Richmond, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to several lots of land which were sold after default under a trust deed. Defendants had judgment, and plaintiff's appeal raises the single ground that the sale was invalid because the lots were sold separately rather than as a unit, as the property was described in the trust deed.

[1-3] Several grounds are urged by respondents upon which the judgment should be sustained, and, if any one of these is good, there must be an affirmance. It is pointed out that the plaintiff did not, by pleading or proof, offer to pay the debt secured by this trust deed, and did not otherwise offer to do equity. This question we had before us in Touli v. Santa Cruz County Title Co., 20 Cal.App.2d 495, 499, 67 P.2d 404, 406, where we said: "* * * One is not entitled to relief in a court of equity who refuses to do equity on his part. In Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673, 678, it is said: 'It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. (See a long list of cases sustaining the equitable rule as variously applied collated in 10 Cal. Jur., p. 512 et seq.) It was clearly erroneous to quiet her title under the circumstances of her refusal to do equity.'"

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

WEST KEY NUMBER SYSTEM

---

33 Cal.App.2d 392

## SKUPEN v. IMPERIAL IRR. DIST. et al.

Civ. 2070.

District Court of Appeal, Fourth District. California.

June 16, 1939.

**1. Damages** 🔑40(1)

Prospective income from an established business may be a proper element of damage.

**2. Waters and water courses** 🔑263

In action for damages to lands used by duck club caused by flooding from irrigation system, evidence *held* not to establish that award of $1,000 damages was inadequate. Civ.Code, § 3333.

**3. Waters and water courses** 🔑263

In action for damages to lands caused by flooding from irrigation system, measure of damages is the amount which will compensate for all the detriment proximately caused by irrigation district's acts, and, as in other tort actions, considerable discretion in fixing such damages rests with court or jury. Civ.Code, § 3333.

Appeal from Superior Court, Imperial County; Clarence Harden, Judge.

Action by B. J. Skupen against the Imperial Irrigation District and others, for damages caused by flooding of land. From a judgment for plaintiff in an insufficient amount, plaintiff appeals.

Affirmed.

Hickcox & Provence, of El Centro, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action for damages alleged to have been caused by the flooding of certain lands used by the plaintiff as a duck club. It is alleged that the defendant negligently permitted waste waters from its irrigation system to flow into the Salton sea, thereby causing the waters thereof to rise and overflow the land in question. Damages were claimed for loss of improvements installed upon the land and for loss of income during the years 1928, 1929 and 1930. The court fixed the amount of plaintiff's damage at $1,000 and entered judgment accordingly. Findings were waived, and the plaintiff has appealed on the sole ground that the amount allowed is inadequate and not sustained by the evidence.

The appellant relies on evidence to the following effect. In 1925 he constructed certain dikes at a cost of $6,000, and also installed certain duck blinds and tanks costing $1,300. In order to bring in fresh water for the duck ponds he built two miles of ditch at an expense of $305. His business increased during 1926 and 1927. In 1927 he had 337 members in his club at an annual fee of $10 each, and made an additional charge for tank shooting and for meals and lodging. Outsiders were given shooting privileges at $7 per day. In 1927 the number of hunters averaged about fifty a week. There was a continual dropping off in this number during the years 1928, 1929 and 1930. His gross income was $900 in 1928, $750 in 1929 and $400 in 1930. It cost him about $1,600 to operate during the years 1928 and 1929. The waters of the Salton sea overflowed the land in 1928, destroying the dikes and other improvements.

It is argued that the appellant was damaged in the amount spent for improvements and also that, taking into consideration the membership fees and charges for other accommodations, "it would be reasonable to estimate that the plaintiff's gross income during 1927 would have been at least $5,000" and that since another man who ran a similar club grossed about $5,000 a year up to and including 1930, it is reasonable to estimate that the appellant's annual gross "would have averaged around $4,000", and that his net income would have been $2,400 a year for the three-year period.

[1, 2] With respect to the loss of income it is attempted to compare the receipts before and after the flooding of the land. While the appellant estimated his gross income in 1927 as $5,000, there is no evidence of his cost of operation in that year. Although an estimate was made as to the cost of operation in subsequent years the appellant admitted that he had commingled funds from this and other places, and there is no evidence from which the cost of operation of this particular enterprise may be determined for any year. There is also evidence that after 1927 the duck season was cut to three days a week, which materially affected the revenue of all such duck clubs, and that during the years 1928, 1929 and 1930 there was a big decrease in the number of ducks in that territory. While, under well-settled rules, prospective income from an established business may be a proper element of damage considerable more certainty in the character of the proof is required than here appears.

There is both a conflict in the evidence and a failure of proof with respect to the value of the improvements claimed to have been destroyed, and as to whether any damage thereto was caused by the acts of the respondent. While the appellant testified that the dikes cost $6,000 in 1925, there is also evidence that they could have been constructed for $240, and there is no evidence as to what they were worth in 1928 when the damage is supposed to have been done. There is no evidence as to what the duck blinds and tanks were worth in 1928, and there is evidence that such blinds and tanks were good only for one season. Although both sides agree that fresh water was necessary for the duck ponds, there is evidence that the ditch which appellant constructed to bring it in was allowed to become filled, was unusable, and that there was no way to get water through it after 1927. There was further evidence to the effect that such dikes as those in question would disintegrate and become worthless in one or two years unless they were kept up, and that the appellant did no work on them after they were constructed in 1925. There is also evidence that not more than one-third of the water coming into the Salton sea during these years came from the respondent's ditches. A part of the evidence would justify the inference that very little of any loss suffered by the appellant occurred as a result of the acts of the respondent.

[3] It is conceded that the measure of damages here is the amount which will compensate for all the detriment proximately caused by the acts of the respondent. Civ.Code, sec. 3333. As in other tort actions, considerable discretion in fixing the amount of damages rests with the court or jury. In view of the conflicting evidence, the absence of evidence in certain respects, and the indefinite and unsatisfactory nature of the evidence in other respects, it cannot be held that an abuse of this discretion here appears. While a more serious question would have been presented had the respondent appealed, the appellant cannot complain if the amount awarded him is more than finds actual support in the evidence.

The judgment is affirmed.

I concur: MARKS, J.

## ESTRIN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.*

Civ. 6256.

District Court of Appeal, Third District, California.

June 23, 1939.

As Modified on Denial of Rehearing July 22, 1939.

Hearing Granted Aug. 21, 1939.

**1. Certiorari 🔑49**

Motion to dismiss certiorari proceeding to review findings and judgment of Superior Court would be granted where certified transcript of proceedings of circuit court had not been filed with District Court of Appeal as required by statute. Code Civ.Proc. §§ 1070, 1071.

**2. Certiorari 🔑57**

On certiorari to review findings and judgment of Superior Court, District Court of Appeal could not review proceedings of Superior Court and determine whether findings and judgment were within issues tried where certified transcript of proceedings of Superior Court had not been filed with District Court of Appeal. Code Civ.Proc. §§ 1070, 1071.

**3. Certiorari 🔑49**

The prosecutor of a writ of certiorari must use due diligence to see that the certificate of transcript required by statute is filed, and for failure to do so the proceeding for review should be dismissed. Code Civ.Proc. §§ 1070, 1071.

**4. Certiorari 🔑49**

It is incumbent upon the prosecutor of a writ of certiorari to see that the return is made, to invoke the aid of the court to compel compliance with mandate of writ, and to use due diligence in having a complete record made out, and his proceeding will be dismissed if he fails to use diligence in the prosecution thereof. Code Civ.Proc. §§ 1070, 1071.

**5. Certiorari 🔑57**

District Court of Appeal cannot rest its review upon allegations found in petition for writ of certiorari, but is limited to a review of the properly authenticated record of the proceedings themselves. Code Civ.Proc. §§ 1070, 1071.

Certiorari proceeding by Sidney E. Estrin, individually and doing business under the fictitious name and style of Estrin's Style Shop, against the Superior Court of the state of California, in and for Sacramento County, and Hon. Martin I. Welsh, Judge thereof, and the Novelty Electric Sign Company (a corporation), wherein petitioner seeks to review findings and a judgment of the Superior Court of Sacramento County. On demurrer and motion to dismiss the proceeding.

Proceeding dismissed.

Busick & Busick, of Sacramento, for petitioner.

Robert H. Schwab, of Sacramento, and Richard S. Goldman, of San Francisco, for respondents.

---

*For subsequent opinion see 96 P.2d 340.

Mr. Justice THOMPSON delivered the opinion of the Court.

The petitioner seeks to review the findings and judgment of the Superior Court of Sacramento County on the alleged ground that the court exceeded its jurisdiction in determining an appeal from a justice's court upon the theory of a reasonable value of services performed in installing an electric sign, while the sole issue which was tendered by the pleadings was based on a written contract.

The writ of certiorari was issued and made returnable April 24, 1939. It directed the certifying and return of the proceedings of the trial court, pursuant to sections 1070 and 1071 of the Code of Civil Procedure. No certified transcript has been filed with this court. The proceedings of the trial court are not before us. On the return day the respondents appeared and moved to dismiss the proceeding, and at the same time filed a demurrer to the petition on the ground that it fails to state facts sufficient to constitute a cause of action. Both the demurrer and the motion to dismiss were presented together.

The petition sets out the amended complaint in the action, which was couched in two counts. The first cause alleges that the Novelty Electric Sign Company agreed in writing to construct and furnish this petitioner with a neon electric sign for the sum of $556.20, which contract was fully performed, and that no part of said indebtedness has been paid. The second cause alleges that the company subsequently performed other services for this petitioner at his special request of the reasonable value of $125, no part of which has been paid. The complaint asked judgment for $681.20. Upon appeal from a judgment which was first rendered in the justice's court, the superior court found that "plaintiff (Novelty Electric Sign Company) agreed to construct" the sign; that it did actually do so and according to agreement continued to service the sign for a period of one year after its installation. The court then found that the value of the "construction" of the sign and services rendered was $517.20, and rendered judgment for that amount. This petition for certiorari was then filed.

[1, 2] We are of the opinion the motion to dismiss this proceeding should be granted for the reason that no certified transcript of the proceedings of the trial court has been filed as required by section 1071 of the Code of Civil Procedure. Without that transcript we are unable to review the proceedings of the trial court, to determine whether the findings and judgment are within the issues which were tried.

[3, 4] It has been determined that it is the duty of the "prosecutor of a writ of certiorari" to use due diligence to see that the certificate of transcript required by section 1071 is filed, and that for failure to do so the proceeding for review should be dismissed. Warren v. Superior Court, 144 Cal. 287, 77 P. 910; The I. X. L. Lime Co. v. Superior Court, 143 Cal. 170, 175, 76 P. 973; Goodrich v. Superior Court, 92 Cal.App. 695, 268 P. 669. The I. X. L. Lime Company case states [143 Cal. 170, 76 P. 975]: "It is incumbent upon the prosecutor of the writ * * * to see that the return is made, to invoke the aid of the court to compel compliance with the mandate of the writ, and to use due diligence in having a complete record made out, and that his proceeding will be dismissed if he fails to use diligence in the prosecution thereof."

[5] In the Goodrich case, supra, it is said [92 Cal.App. 695, 268 P. 670]: "The petition having become 'functus officio' upon the issuance of the writ herein, we cannot rest our review upon any of the allegations found therein (Donovan v. Police Commrs., 32 Cal.App. 392, 397, 163 P. 69), but we are limited to a review of the properly authenticated record of the proceedings themselves."

For the reasons assigned, this proceeding is hereby dismissed.

We concur: PULLEN, P. J.; TUTTLE, J.

## On Petition for Rehearing.

PER CURIAM.

On petition for rehearing our attention is called to the fact that petitioner did object at the trial to evidence of the reasonable value of the construction of the neon sign in question. Reference in our opinion to the presumption in support of the judgment that the issue of quantum meruit was tendered at the trial by consent of respective counsel is therefore inapplicable to the record of this proceeding for certiorari.

For the reason that a certified transcript of the proceedings of the trial court was not filed in this court as required by law, the petition for a writ of certiorari was properly dismissed. The petition for a rehearing is denied.

34 Cal.App.2d 65

**HAMPTON v. ERICSSON & MUDD et al.**
**VASSAR v. SAME.**
**Civ. 2436.**

District Court of Appeal, Fourth District, California.

Aug. 9, 1939.

**Appeal and error ⚷786, 1126**

On appeal from judgment for plaintiff in sum of approximately $20,000 for injuries received in automobile collision, motion to dismiss defendant's appeal or affirm judgments on ground that appeals were taken for delay only and that questions raised by opening brief were so unsubstantial as not to need further argument was denied, where it was contended in opening brief that damages were excessive, evidence was insufficient to justify judgment, and that certain instruction was prejudicially erroneous under circumstances shown by evidence.

◆

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action for injuries received in automobile collision by C. S. Hampton and W. C. Vassar against Ericsson & Mudd, a copartnership, and others. Judgment for plaintiff in the sum of $20,000 and the defendants appeal. On motion to dismiss appeal or affirm judgments.

Motion denied.

Jess G. Sutliff, of Independence, for appellants.

A. J. Getz, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss these appeals or affirm the judgments on the grounds that the appeals were taken for delay only and that the questions raised by the opening brief are so unsubstantial as not to need further argument.

The respondents recovered judgment totaling about $20,000 for injuries sustained in an automobile collision. In the opening brief it is contended that the damages are excessive, that the evidence is not sufficient to justify the judgments, and that a certain instruction was prejudicially erroneous under the circumstances shown by the evidence. The main questions presented are whether certain employees of the appellants were, at the time, acting within the scope of their employment and whether the court erroneously instructed the jury in connection with that question.

It not only clearly appears from the moving papers and the opening brief that a decision of this case will require an examination and consideration of the entire record, but it appears that at least two close questions are presented in connection with which the court is entitled to have the assistance of counsel for the respondents.

The motion is denied.

We concur: GRIFFIN, J.; HAINES, Justice pro tem.

33 Cal.App.2d 442

## HOLUBAR v. SUPERIOR COURT OF RIVERSIDE COUNTY et al.

Civ. 2432.

District Court of Appeal, Fourth District, California.

June 19, 1939.

Rehearing Denied July 11, 1939.

Hearing Denied Aug. 17, 1939.

**1. Criminal law ⇨260(7)**
**Municipal corporations ⇨642(3)**

Where the use of a transcript is authorized by judicial council rule governing criminal appeals to superior court from municipal and inferior courts, it is not required that a copy thereof be served on the other side, but merely that the respondent be notified of the filing thereof. Judicial Council Rules, rule 4.

**2. Criminal law ⇨260(7)**
**Municipal corporations ⇨642(3)**

The judicial council rule governing criminal appeals to the superior court from municipal and inferior courts does not require full and complete statement of all evidence in statement on appeal, but requires merely general statement of such portions of evidence as are relied on to support the points raised. Judicial Council Rules, rule 4.

**3. Municipal corporations ⇨642(3)**

The superior court improperly dismissed appeal from judgment of city court convicting appellant of violation of city ordinance for failure to file and serve sufficient proposed statement on appeal, where statement was clearly sufficient as to grounds alleging error in exclusion of evidence and insufficiency of evidence to justify verdict, the evidence which was excluded being set out and materiality thereof sufficiently appearing from allegations of complaint and exhibits, and evidence relied on as showing that no crime was committed being set out in the statement. Judicial Council Rules, rule 4.

Original certiorari proceeding by Walter Holubar against the Superior Court of Riverside County, George R. Freeman, Judge thereof, and others, to review an order of the superior court of Riverside County dismissing an appeal taken to that court from a judgment of the city court of the City of Palm Springs.

Order annulled with directions.

John L. Bisher, Jr., of Los Angeles, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, and Roy W. Colegate, City Atty., of Palm Springs, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to review an order of the Superior Court of Riverside County dismissing an appeal taken to that court from a judgment of the city court of the city of Palm Springs.

The petitioner was charged with a violation of a building ordinance passed and adopted by the city council of Palm Springs on June 8, 1938, in that he had proceeded with the erection of a building in that city without first having obtained a certain permit as required by that ordinance. A jury found him guilty. The evidence at the trial was taken down by a duly appointed official reporter pro tem of the Superior Court of Riverside County, who was duly sworn by the judge of the city court at the beginning of the trial. Judgment was entered on December 2, 1938, imposing a fine of $101 on petitioner.

A written notice of appeal was filed on December 2, 1938, and another such notice on December 7, 1938. On December 7, there was filed a transcript of all testimony taken at the trial, certified as correct by the person who had acted as reporter. On the same day a notice of the filing of such transcript was served on the city attorney and filed. On the same day, a proposed statement on appeal was served and filed, in attempted compliance with rule 4 of the judicial council rules governing criminal appeals to the superior court from municipal and inferior courts. On December 12, the city attorney served and filed proposed amendments to the statement on appeal, suggesting the addition of two matters. Thereafter, the trial judge served notice fixing January 3, 1939, as the date for settlement of said transcript and statement on appeal. On that day the city attorney filed objections to the proposed statement on appeal and to the proposed transcript on the grounds that the proposed statement "does not set forth any other evidence or other proceedings necessary for a decision upon the appeal", that the transcript was not that of an official reporter since there was no official reporter for said court, and that a copy of the transcript was not served on him. The matter was continued, and on January 18, 1939, the trial judge settled the statement on appeal and the transcript. On the same day the petitioner presented an engrossed statement on appeal and the transcript, which were certified as correct by the trial judge.

The pleadings, records and files of the city court in this case, including the transcript and statement on appeal, were filed in the superior court on January 24, 1939. When the matter came on for hearing on March 28, 1939, the court entered an order dismissing the appeal "on the ground that the defendant failed to file and serve a proposed statement on appeal within five days as required by Judicial Council rules". This proceeding to review that order followed.

The respondents contend that the appeal in question was ineffectual because the statement on appeal did not comply with that part of rule 4 of the judicial council rules which provides that such a statement shall set forth so much of the evidence as is necessary for a decision upon the points raised. It is further contended that the transcript which was filed could not be considered or taken as a part of the statement on appeal since that portion of rule 4 permitting the use of a transcript relates only to appeals from municipal courts and class A justice's courts, because only in those courts "is there such a thing as an official reporter". It is argued that since the law makes no provision for official reporters in class B justice's courts and city courts, the rule in question was not intended to permit the use of a transcript on an appeal from such a court. It is then argued that, in any event, a copy of the transcript was not served on the respondents.

[1] With respect to the last point it may be noted that where the use of a transcript is authorized by rule 4 it is not required that a copy thereof be served on the other side, but merely that the respondent be notified of the filing thereof. It may well be questioned whether rule 4 was intended to limit the use of transcripts on such appeals in the narrow and technical manner ascribed to it by the respondents. While there is no provision of law establishing official reporters for such courts as the one from which this appeal was taken, it is equally true that there is no law forbidding the use of a reporter in such a court. Reporters who have qualified for service in the superior court are frequently used in such inferior courts and, when properly appointed and sworn in a particular case in such a court, it may well be questioned whether they are not official reporters within the meaning of this rule. The question suggested, however, need not be here decided if the statement on appeal was in itself sufficient.

The main question presented is whether that statement is so deficient, under the requirements of rule 4, as to make the attempted appeal ineffectual. Beyond stating that there was a failure to comply with this rule the respondents have furnished us with no assistance, and have failed to point out any respect in which the statement is deficient in this regard. The respondents' position seems to be that a transcript of the evidence cannot be permitted and that anything less than a full and correct transcript of the evidence is not a sufficient statement to enable the appeal to be decided. If the rules are to be thus strictly interpreted, the result is that no appeal may be taken from such a court.

[2] Rule 4 provides that in such a statement the appellant shall specify the grounds of appeal "and set forth so much of the evidence and other proceedings as are necessary for a decision upon said grounds. Said grounds of appeal shall be stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain, but this may be done by any general description calling attention to the points to be made, without specifying each separate ruling or other matter to be complained of. If one of the grounds of appeal is insufficiency of the evidence, the particulars in which it is insufficient shall also be stated." It is then provided that any evidence necessary to a consideration of the points raised shall also be set forth, but that any exhibit or paper on file with the trial court may be referred to by merely identifying it. In our opinion this rule requires not a full and complete statement of all the evidence received but merely a general statement of such portions of the evidence as are relied on to support the points raised.

[3] The statement on appeal here in question, after two pages of preliminary matters, sets forth fourteen numbered paragraphs pointing out the grounds of appeal relied upon. In one of these, error is assigned in the giving and refusing of instructions, and in this respect the state-

ment seems to fully comply with the requirements of rule 4. Four other grounds relate to alleged errors of the court which have no relation to the evidence and are obviously sufficient. Three more grounds allege errors of the court in excluding evidence offered by the petitioner. In each of these instances the evidence which was excluded is rather completely set forth. The materiality of such evidence sufficiently appears from the allegations of the complaint and from certain of the exhibits, which are referred to. The fourteenth specification of error is the insufficiency of the evidence to justify the verdict. While the statement refers to the transcript in support of this ground, it also proceeds to set forth in general language certain evidence given on behalf of the people and certain evidence given on behalf of this petitioner which is relied upon as showing that no crime was committed.

The gist of this whole matter is that the petitioner contended that the ordinance in question was inapplicable to him because, prior to its adoption, he had secured another permit and begun actual construction of a building at considerable expense, and that the trial judge took the position that such facts were immaterial. In pronouncing judgment the trial court stated that the sole question for the jury was "Did the defendant or did he not proceed with the erection of his building without obtaining a permit under the Building Ordinance? Everything else was foreign to the issue." By his appeal the petitioner sought an opportunity to present this clearcut issue to a higher court. If it be assumed that the transcript was no part of the statement on appeal, and further conceding that a few of the grounds set forth in the statement did not sufficiently outline the evidence necessary to their consideration, the fact remains that with respect to most of the grounds of appeal, including those raising the real points in issue, the statement on appeal sufficiently complied with all the requirements of rule 4. It follows that the respondent superior court exceeded its jurisdiction in dismissing the appeal without hearing and deciding the issues which were thus properly before it.

The order dismissing the appeal is annulled. It is further ordered that the original papers sent to this court by the judge of the city court of the city of Palm Springs, by way of return, be sent by the clerk of this court to the clerk of the Superior Court of Riverside County.

I concur: MARKS, J.

33 Cal.App.2d 447

## KNECHT v. LOMBARDO et al.

Civ. 11812.

District Court of Appeal, Second District, Division 1, California.

June 21, 1939.

**1. Appeal and error 🔑213**

Where it was apparent from record that motion for judgment of nonsuit was understood by all concerned to have been made, argued, and decided on the single ground that negligence, if any, of defendants was not proximate cause of accident, and plaintiff failed to complain that motion was too general, alleged failure to point out in motion the grounds on which it was based would not warrant reversing judgment of nonsuit.

**2. Trial 🔑166**

The rule requiring a specific statement of the defects in proof on which motion for nonsuit is based is for court's protection and has application only to cases in which motion for nonsuit is denied.

**3. Appeal and error 🔑854(5)**

An order granting a nonsuit will be sustained if motion therefor might have been properly granted on any ground, whether made a ground of the motion or not.

**4. Appeal and error 🔑927(3)**

The reviewing court in analyzing sufficiency of proof as against motion for nonsuit was required to disregard conflict in evidence and to give full credit only to that portion thereof which tended to support allegations in plaintiff's amended complaint.

**5. Appeal and error 🔑994(2), 997(2)**
**Trial 🔑139(1), 140(1)**

Neither the trial court nor the reviewing court may, in considering motion for nonsuit, weigh the evidence or judge of the credibility of witnesses.

**6. Appeal and error** ⚩927(3)

The reviewing court, on appeal from judgment of nonsuit as to two of defendants in death action, would proceed on basis that plaintiff was required merely to offer competent evidence of such substantial nature that it might reasonably be inferred that negligence of such defendants was sole proximate cause of the death.

**7. Appeal and error** ⚩927(3)

On appeal from judgment of nonsuit as to two of defendants, the reviewing court was required to view the evidence in the light most favorable to the plaintiff.

**8. Trial** ⚩165

On motion for nonsuit, the court must determine whether there is in the record sufficient evidence which, if believed, would sustain a verdict for plaintiff.

**9. Automobiles** ⚩245(57)

In action for death of minor child, evidence with respect to traffic violations committed by driver of bakery truck in parking and driving on wrong side of street was sufficient, as against motion for nonsuit, to support charge that driver's negligence was proximate cause of death. Vehicle Code, §§ 525, 527(a), 586(e, h), 760, 762, 763, St.1935, pp. 181, 182, 192, 243, 244.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Leatha M. Knecht against Roy Lombardo and others to recover damages for alleged wrongful death of plaintiff's minor son. From a judgment of nonsuit entered in favor of Al Lowenberger, also known as Adolph Lowenberger, and the Helms Bakeries, the plaintiff appeals.

Reversed and cause remanded for new trial.

Sylvester Hoffmann and Vernon Olson, both of Los Angeles, for appellant.

Lyndol L. Young and Joseph H. Edgar, both of Los Angeles, for respondents.

WHITE, Justice.

This appeal is from a judgment of nonsuit entered in favor of defendants Helms Bakeries, a corporation, and Adolph Lowenberger, in an action instituted by plaintiff as the mother of her deceased minor son to recover damages for the alleged wrongful death of the latter.

Epitomized, the facts disclosed by the record are that on the date of his demise the minor was slightly over seven years of age. At the time of the accident he was a student in the first grade at the Woodcrest Grammar School, to which institution he was returning after having had his lunch. The school is located at the northeast corner of 109th street and Budlong avenue in the city of Los Angeles, 109th street extends in an easterly and westerly direction and is forty feet in width. Budlong avenue runs in a northerly and southerly direction. Shortly prior to the fatality, defendant Lowenberger, employed by defendant Helms Bakeries, a corporation, and while in the scope and course of his employment vending from the auto truck the bakery products of his employer, drove the said auto truck over on to the south (wrong) side of 109th street, headed in a westerly direction, and stopped his vehicle about six feet from the southerly curb of 109th street, where he engaged in the making of a sale of bakery products to one Dillman. Other vehicles were parked on both sides of 109th street in the vicinity of the Helms Bakery truck. While the sale and purchase negotiations were in progress at the truck, the deceased minor was standing in the street to the left of the purchaser, eating an orange. His business with Mr. Dillman being completed, defendant Lowenberger started the bakery truck in a westerly direction toward the next house, forty to fifty feet distant, but continuing on the southerly (wrong) side of the street. About this time a motor truck entered 109th street from Budlong avenue and proceeded in an easterly direction, operated by one Pennington and owned by one Lombardo, both of whom were originally named as defendants, but as to whom the plaintiff dismissed the action on the morning of the trial. As the last-named truck passed respondent's truck, it struck and killed the plaintiff's seven-year-old son as the latter was running across 109th street from behind the Helms Bakery truck. As the eastbound truck passed respondent's truck the projecting stake body of the eastbound truck struck the child when he was at a point about the middle of the street, resulting in injuries to which he later succumbed.

[1-3] Appellant takes the position that the location of respondent Helms Bakeries' truck and the vehicles parked at the curb obscured the vision of Pennington, driving

the eastbound truck, so that the latter could not see the boy until he emerged from behind the Helms Bakeries' truck and when it was too late to avoid the accident, and also that the position of the aforesaid vehicles obscured and obstructed the vision of the boy from seeing the approaching east bound truck prior to the time the minor reached a point approximately in the center of the street. This situation, appellant asserts, was the sole proximate cause of the minor's death. As her first ground for reversal, appellant contends that the motion for a nonsuit was fatally defective for the reason that the same failed to point out any of the grounds upon which it was made. In this claim appellant cannot be upheld. That the proceedings had upon the hearing of the motion for a nonsuit were sufficient to inform the court and counsel of the specific ground of the defendant's motion is made manifest by the following quotation from the record:

"Mr. Young (counsel for defendants): May it please the court, I move the court at this time for judgment of nonsuit in favor of the Helms Bakeries and the defendant Lowenberger.

"The Court: I would like to hear from you on that, Mr. Hoffman.

"Mr. Hoffman (counsel for plaintiff): I have cases here that will sustain our position. It will be conceded by counsel that the Helms' man was violating the law at the time of the accident.

"The Court: He was on the wrong side of the street, no question about that.

"Mr. Hoffman: Furthermore, he had violated the law by parking double on the wrong side of the street.

"The Court: Stipulate to that, too.

"Mr. Hoffman: In other words, there can be no question he was negligent per se. The only question is did it contribute to the death of the boy.

"The Court: That is all."

From the foregoing, it is at once apparent that the motion was understood by all concerned to have been made, argued and decided on the single ground that the negligence, if any, of the defendants was not the proximate or contributing cause of the accident in question. Appellant's failure, when she heard the motion made, to complain because it was too general and not specific, coupled with the fact that the motion was argued at some length in the trial court, adds further support to the conclusion that appellant's counsel knew and understood the sole and only question presented on the motion for nonsuit. The rule requiring a specific statement of the defects in the proof that has been made by the plaintiff when a motion for a nonsuit is made is for the court's protection and has application only to cases in which the motion for nonsuit is denied, and not to an order granting it. In the last-named instance, the motion will be sustained if it might have been properly granted upon any ground, whether made a ground of the motion or not. Anchester v. Keck, 214 Cal. 207, 212, 213, 4 P.2d 934. See, also, opinion of the Supreme Court denying a hearing in Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 469, 12 P.2d 744, 13 P.2d 905.

[4-7] We deem it unnecessary, before proceeding with a discussion of the evidence, to set forth the rule governing the power of the trial court to grant a nonsuit, because the same has been before the courts of this state on many occasions, and is firmly established by In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579. In analyzing the proof to determine whether it contains evidence of sufficient substantiality to support a verdict for plaintiff if such a verdict were given, we must disregard the fact that there is a conflict in such evidence, and give full credit only that portion of the evidence which tends to support the allegations contained in plaintiff's amended complaint. We cannot, nor was the trial court authorized, in determining the motion for a nonsuit, to weigh the evidence or judge of the credibility of witnesses. We proceed, therefore, upon the basis that plaintiff was required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that the negligence of the defendants Helms Bakeries and Adolph Lowenberger was the sole proximate cause of the minor's death. That respondent Lowenberger was guilty of negligence cannot be denied. By driving on the southerly or "wrong" half of 109th street he violated section 525 of the Vehicle Code, St. 1935, p. 181. By passing to the left of the eastbound truck operated by Mr. Pennington, respondent Lowenberger transgressed subdivision (a) of section 527 of

the Vehicle Code, St.1935, p. 182. When the same respondent stopped, parked and permitted his vehicle to stand in front of a private driveway and on the roadway side of other parked vehicles, he offended against section 586, subdivisions (e) and (h), of the Vehicle Code, St.1935, p. 192. Each of these violations were unlawful and constituted separate misdemeanors. Secs. 760, 762, 763, Vehicle Code, St.1935, pp. 243, 244. As to this negligence on the part of respondents constituting the proximate cause of the accident, and viewing the evidence, as we must, in the light most favorable to appellant, we find testimony by Mr. Pennington, driver of the eastbound truck, as follows: "Well, the instant I passed him" (referring to respondent's bakery truck) "a little boy ran off from the back of the Helms truck"; while the witness Dillman, who was making a purchase from the bakery truck, further testified that the minor was standing alongside of him and that following the completion of the purchase by the witness, respondent Lowenberger started westward on the "wrong" side of the street with the driver continuing to carry on a conversation with the witness while the latter was backing away from the bakery wagon; that as the bakery wagon drove away "* * * I was still looking at him. Just instantly I saw another truck pass the rear of this truck here, the Helms truck." The witness then noticed the child "start out across the street". We also find the following questions propounded and answers given thereto by Mr. Dillman:

"Q. * * * Calling your attention to the Helms truck marked P-2 when you were making the purchase, assume that this cross is the place where the boy landed, that P-6 is the place where the Pennington truck was at the moment of the impact, how far had the Helms truck proceeded from the time that he started off in front of you and the moment you saw the boy get hit? A. Approximately about 15 or 20 feet; the length and a half of the truck, I would say.

"Q. So that—— A. 20 feet I would say.

"Q. About 20 feet between P-2 at the time you completed the purchase and P-3 at the time of the impact with the Pennington truck; is that correct? A. Yes, sir."

[8, 9] It is true that certain inconsistencies can be made to appear in the foregoing testimony, as suggested by respondent, by mathematical computations based upon answers given by the witnesses on cross-examination as to distances; but on motion for a nonsuit the court must determine whether there is in the record sufficient evidence which, if believed, would sustain a verdict for the plaintiff. In the case at bar we are persuaded that there was evidence to support plaintiff's contention that the driver of respondent's bakery wagon was guilty of negligence under the circumstances of this case which proximately contributed to the death of the child. With the minor standing alongside his truck while the driver was talking with Mr. Dillman and surrounded as he was with children playing in and about the school grounds and walking upon the sidewalks, such driver should have anticipated thoughtlessness and impulsiveness in the conduct of these children. It may reasonably be assumed, if some of the evidence is believed, that had respondent Lowenberger complied with the provisions of the California Vehicle Code and not parked his truck on the "wrong" side of the street in the second lane of traffic, and had he not continued on the "wrong" side of the street when driving away after completing his sale to Mr. Dillman, the view of the driver of the eastbound truck and the view by the child of the same truck might not have been obscured as the boy started across the street from behind respondent's bakery wagon. Based upon the evidence in this case and the inferences reasonably deducible therefrom, we find no grounds which warranted the granting of a nonsuit.

It should be understood that throughout this opinion we have taken the evidence most strongly in plaintiff's favor, as we are bound to do where an appeal is taken after the granting of a nonsuit. We wish it understood that we are expressing no opinion as to the weight of the evidence or its truth or falsity.

The judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

33 Cal.App.2d 363
91 P.2d 921

## JOHNSTON v. BLACK CO. et al.

Civ. 10880.

District Court of Appeal, First District, Division 2, California.

June 15, 1939.

Rehearing Denied July 15, 1939.

Hearing Denied Aug. 14, 1939.

**1. Physicians and surgeons 🔑14(1)**

A patient in physician's office was an "invitee" and physician was bound to exercise reasonable care to protect patient from being injured.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

**2. Physicians and surgeons 🔑15**

The exercise of reasonable care required physician to make ordinary examinations, but not exterior examinations of fluoroscope table to protect patient from injury.

**3. Physicians and surgeons 🔑15**

In patient's action against physicians and nurse for injuries sustained when mechanism of fluoroscope table broke, nurse not having license was not an incompetent operator and was not negligent in not testing table before directing patient to get on it and in her manner of operating the table, where nurse was not required to have license to operate table and table was used several times a day and had been used on preceding day by patient and table was out of control when nurse discovered it was not working properly.

**4. Physicians and surgeons 🔑18(6)**

Where patient seeking recovery against physician and nurse for injuries sustained when mechanism of a fluoroscopic table broke, presented her case under the doctrine of res ipsa loquitur, showing that table was under management of defendants and that accident was such that in the ordinary course of things does not happen if proper care is used, inference of negligence arising from proof of such facts was dispelled when defendants introduced evidence that table was purchased from a reliable manufacturer, was frequently inspected, and prior to the accident nothing had occurred to indicate that there was anything wrong with it.

**5. Negligence 🔑121(2)**

An inference of negligence under the res ipsa loquitur doctrine is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt even though such evidence is produced by the opposite side.

**6. Appeal and error 🔑1068(3)**

Instructions which allegedly stated the law incorrectly were not prejudicial to plaintiff where evidence contained in record would not support a verdict for the plaintiff.

---

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Action by Annie B. Johnston against the Black Company and others for injuries sustained when the mechanism of a fluoroscopic table broke. From the judgment, the plaintiff appeals.

Affirmed.

Archer Bowden, of San Jose, and Burbank & Laumeister, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco, Maurice J. Rankin, of San Jose, and Gus L. Baraty, Howard Hassard, and Robert M. Davis, all of San Francisco, for respondents Dr. Robert A. Powers and Virginia Huntington.

STURTEVANT, Justice.

This is an action to recover damages for personal injuries. In her complaint the plaintiff named a number of persons, including one corporation. Summons was served on three of the natural persons. By stipulation of counsel the trial court instructed the jury to return a verdict in favor of the defendant Dr. Dorothy J. Starks. As to the defendants Dr. R. A. Powers and Virginia Huntington, his nurse, the cause was submitted to the jury and it returned a verdict in their favor. From the judgment entered on that verdict the plaintiff has appealed.

In the latter part of 1936, while residing at Palo Alto, the plaintiff became ill. She consulted Dr. Sox. He examined her and directed her to report to the office of Dr. Powers for an X-ray examination. Dr. Powers and Dr. Starks jointly occupied the same office. Miss Huntington was a nurse in attendance at the office. On the 19th day of January, 1937, the plaintiff went to the office of Dr. Powers, was ushered into a dressing room, directed to disrobe, and then to take a position on a fluoroscopic table. Dr. Powers was not present but Dr. Starks informed the plaintiff that she would act in his place. The fluoroscopic table was in a perpendicular position. At the bottom it had a foot rest. The plaintiff was directed to step upon the foot rest with her back against the table. She did so. Thereafter Miss Huntington commenced to operate the table to bring it to a horizontal position with the plaintiff upon it. While being so operated the mechanism of the table broke. As it did so Miss Huntington attempted to reverse the movement of the table. It did not respond to the switch but continued to move backward and the plaintiff was thrown backward off the table in such a manner that her neck and shoulders struck the wall and floor. In falling she suffered the injuries for which she sought to recover in this action.

Soon after the accident, A. E. Bush, a representative of the manufacturer, went to San Jose to investigate the cause of the accident. On the trial he was called as a witness by the defendants. He was shown photographs which he identified as being photographs of Dr. Powers' fluoroscopic table in different positions. From that testimony it appears that the table, in ordinary language, could be termed a tilting table operated by gears which in turn are moved by electric power. At a point about midway in the length of the table a shaft extends at right angles from side to side underneath the table. On the ends of the shaft gears are attached. Through those gears and the shaft a tapering hole is bored. Into that hole is driven a tapering pin about a quarter of an inch in diameter. Above the head of the pin is a screw to prevent the pin from coming out if it gets loose. The gears are enmeshed in a heavy grease and are enclosed in a gear box. Mr. Bush testified that when he arrived at the office of Dr. Powers the table was in a trendle-bearing position or about thirty degrees down below normal. The foot end was up. A slight test disclosed that there was a break in the mechanism. By the use of pries he raised the table to a horizontal position and placed supports underneath. He then crawled under the table, took off the gear covering, and with a punch removed the pin. It was broken and the parts showed it was broken from crystallization.

[1-3] The first point made by the plaintiff is that the evidence is insufficient to justify the verdict. She recites practically all of the evidence, then she claims that the doctrine of res ipsa loquitur indisputably applied. That, as the doctrine of res ipsa loquitur was applicable, plaintiff claims she was entitled to a verdict unless defendants produced evidence to rebut the prima facie case made by her and that the defendants did not do so. In reply the defendants earnestly contend they did introduce evidence rebutting the prima facie case made by the plaintiff. These conflicting contentions are addressed to different elements of the proof. (1) The plaintiff contends the defendants made no examination of the table after the same was purchased. That contention is wholly at variance with the evidence of several witnesses introduced at the trial. However, as we understand her, the plaintiff's real contention is that the defendants had not, from time to time, caused the gear box to be taken off, the gears to be removed, the pin to be taken out of its socket and placed under an X-ray to determine if crystallization had occurred. The defendants reply that in the exercise of due care a physician and surgeon is not bound to go to such lengths in making a proper examination. That reply is well founded. The plaintiff was an invitee and as such the defendants were bound to exercise reasonable care to protect her from being injured. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 561, 296 P. 76; Micek v. Weaver-Jackson Co., 12 Cal.App.2d 19, 21, 54 P.2d 768. But, in the exercise of reasonable care, the defendants were not bound to make exterior examinations of the table. They were bound only to make ordinary examinations. Baddeley v. Shea, 114 Cal. 1, 5, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56; Diamond v. Drew, 17 Tenn.App. 488, 68 S.W. 2d 955, 957; Warner v. Erie Railway Co., 39 N.Y. 468, 474. (2) The plaintiff earnestly contends that Miss Huntington was an incompetent operator. She was called as a witness and testified to facts showing she had had several years of experience and was competent. The plaintiff says she had no license. What license a person needs to operate a fluoroscopic table, a barber chair, a Morris chair, or any other tilting chair, the plaintiff does not inform us. (3) The plaintiff further contends that Miss Huntington was negligent because she did not make a test of the apparatus before causing the plaintiff to take a position on the table. The plaintiff does not show what Miss Huntington neglected in that behalf. There was testimony that the table was used several times a day. The plaintiff had undergone other examinations

on the same table, to-wit, on January 8, 9, 13, 14, 15, 18, and then took her position on the table again on the 19th. What additional tests Miss Huntington should have made before placing Mrs. Johnston on the table the brief does not disclose. (4) The plaintiff also claims that Miss Huntington operated the table in a negligent manner. That claim is based on these facts. As stated above the table was constructed to be operated by electric power. That power was controlled by a switch located in the side of the table near which Miss Huntington stood. When the plaintiff had taken her place on the table, Miss Huntington moved the switch for the purpose of bringing the table in position to make the X-ray examination. As the table was moving Miss Huntington heard the metal pin break. At the same time she noticed that the table did not move properly. She moved the switch in the opposite direction to bring the table back into its former position. It did not respond to the power, but continued to move backward and to dip toward the head. In so moving the switch the evidence did not disclose an act of negligence. On the contrary, the evidence was without conflict that after the pin broke the table was out of control and the movement of the switch had no effect whatever on its movements.

[4-6] The plaintiff complains because the court gave certain instructions which she asserts were not correct statements of the law. However, as we view the record, it is clear those instructions were not prejudicial to her. As we have shown above, in presenting her case she relied on the doctrine of res ipsa loquitur. It was her contention that when she had shown that the fluoroscopic table, the thing which caused her injury, was under the management of the defendants, and the accident was such as in the ordinary course of things does not happen if those who have the management use proper care, an inference arose, in the absence of explanation by the defendants, that the accident was caused from a want of proper care. Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L.R.A. 718, 48 Am.St. Rep. 146. She introduced no direct evidence to prove the defendants were negligent. After she had rested the defendants took up the proof and introduced evidence to the effect that the fluoroscopic table was purchased about eight years before the date of the accident from a reliable manufacturer, that the table was of standard make, that many others were being used in the state of California and elsewhere and that some of them have been in use for about twenty-five years. The defendants' table was in daily use and sometimes was used three or more times a day. It was, at frequent intervals, oiled, cleaned, inspected, and minor repairs made thereon. Prior to the accident to the plaintiff nothing had occurred that indicated any weakness in or wear on the metal pin which broke. Prior to the moment of the accident the defendants had no notice whatever of any defect in the pin or in the table. In Baddeley v. Shea, 114 Cal. 1, at page 5, 45 P. 990, at page 991, 33 L.R.A. 747, 55 Am.St.Rep. 56, the court states and quotes as follows: "In speaking of the liability of owners of private houses for the consequences of defects therein dangerous to invited visitors on lawful business, Mr. Wharton, in his book on Negligence (section 825), says: 'For the question, when such liability is mooted in reference to such a visitor, is whether the proprietor exercised in his house the care which good housekeepers are accustomed to exercise. What is such care? Certainly, when we recollect the great varieties of habit and taste in this respect, all we can ask is that the house, to those visiting it, should be free from those obvious defects of which an occupant, not an expert in mechanics, would be cognizant. *Those latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose.*'" (Italics ours.) True, that particular statement was addressed to houses but the cases cited, 114 Cal. on page 7, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56, of the Baddeley case clearly show the rule is equally applicable to the appurtenances and furnishings of a house. Applying that rule to the facts in the instant case, it is clear the record contains no evidence that would have supported a verdict for the plaintiff. Having introduced the evidence above mentioned the inference on which the plaintiff relied was dispelled as a matter of law. Engstrom v. Auburn Automobile Sale Corp., 11 Cal. 2d 64, 77 P.2d 1059. In the cited case, having called attention to the difference between a presumption and an inference, 11 Cal.2d on page 70, 77 P.2d on page 1063, the court said: "On the other hand, an

*inference* is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side. Maupin v. Solomon, 41 Cal.App. 323, 324–326, 183 P. 198; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461." It follows that the evidence contained in the record would not support a verdict for the plaintiff whether the instructions complained of were technically correct or otherwise.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

33 Cal.App.2d 460

**PLOTT et al. v. YORK et al.**

**Civ. 11810.**

District Court of Appeal, Second District, Division 1, California.

June 23, 1939.

**1. Judgment ⇨630**

In action for injuries brought against both employer and employee, based on negligence of employee in operating automobile, judgment in favor of employee enured to benefit of employer who suffered default, where defenses interposed by employee were not personal to himself, but went to whole right of plaintiffs to recover, and hence judgment was properly entered not only in favor of employee, but in favor of employer.

**2. Judgment ⇨630**

Where plaintiffs elected to present their application for final judgment against defaulting defendant in connection with trial of action as to answering and allegedly primarily liable defendant, and to allow jury to assess damages, if any, at such time, trial court properly instructed jury that as prerequisite to their assessing damages against defaulting defendant, jury should determine question of liability of answering and primarily liable defendant.

**3. Appeal and error ⇨1046(1)**

Permitting attorneys for defaulting defendant as amici curiæ for an interested party, to present argument and brief in opposition to plaintiffs' motion for final judgment against defaulting defendant, was not prejudicial error.

**4. Appeal and error ⇨790(3)**

An appeal from an order denying plaintiffs' motion to enter final judgment against defaulting defendant was dismissed, where questions raised by such appeal were determined upon appeal from the judgment.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Lulu M. Plott and Reecil Poor against C. H. York and the Foothill Supply Company for injuries sustained in automobile collision. From an order denying plaintiffs' motion to enter final judgment against defendant company after a default had been entered against defendant company, and from a judgment for the defendant company, the plaintiffs appeal.

Appeal from order dismissed. Judgment affirmed.

See, also, 27 Cal.App.2d 618, 81 P.2d 446.

Joseph L. Fainer and H. C. Ellis, both of Los Angeles, for appellants.

Flanagan & Sampson, James A. Flanagan, and Richard Hunt Sampson, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from an order and the judgment rendered thereon in favor of the Foothill Supply Company, a corporation, defendant, in connection with plaintiffs' motion for entry of final judgment and the assessment of damages in plaintiffs' favor after a default entered against defendant and respondent herein.

On January 27, 1937, plaintiffs commenced an action against one C. H. York and the Foothill Supply Company, a corporation, to recover damages for personal injuries sustained by the former as the result of a collision between an automobile operated by the plaintiff Lulu M. Plott in which the plaintiff Reecil Poor was riding as a guest, and an automobile alleged to have been negligently operated by defendant C. H. York while the latter was acting in the course and scope of his employment as agent, servant and employee of his co-defendant, the Foothill Supply Company.

The defendant C. H. York duly filed an answer denying the material allegations of the complaint and setting up the further special defenses of unavoidable accident and contributory negligence. On February 12, 1937, defendant Foothill Supply Company was served with a copy of summons and complaint, but failed to appear or file an answer or other pleading, and upon application of plaintiffs default was entered against defendant corporation on May 8, 1937. Upon the issues framed by the complaint and the answer of defendant York the case proceeded to trial before a jury on January 19, 1938. By reason of dismissals seasonably filed, there remained only the two plaintiffs, Lulu M. Plott and Reecil Poor. At the conclusion of the evidence the cause was submitted to the jury on the question of liability as to the answering defendant York, whereupon counsel for plaintiffs proffered an instruction directing the jury to return a verdict in favor of plaintiffs as against the defaulting defendant Foothill Supply Company. The requested instruction reads as follows:

"You are instructed to return verdicts in favor of the plaintiffs Lulu M. Plott and Reecil Poor and against the defendant, The Foothill Supply Company, a corporation, for the amount of damages you find they have suffered, respectively, under instructions given you respecting damages."

The trial judge rejected this instruction, and in its stead prepared and gave to the jury the following instruction:

"You are instructed that defendant Foothill Supply Company, a corporation, failed to appear or answer in this case and its default has been entered herein, and the question of entering any judgment against that defendant is for the court to determine. To aid the court in that respect you are directed to render special verdicts on forms which will be provided, wherein you find the amount of damage suffered by Lulu M. Plott and Reecil Poor respectively. These special verdicts you will find and return into court, irrespective of what your verdicts may be as to defendant C. H. York.

"You are further instructed that your first duty is to determine the question of liability of defendant, C. H. York, before you approach the question of amount of damages suffered."

The jury returned a general verdict in favor of the answering defendant C. H. York, but being unable to agree on the amount of damages sustained by one of the plaintiffs as against the defaulting defendant, was discharged. Thereupon the court continued the matter as to the defaulting defendant, the Foothill Supply Company, to February 4, 1938, at the same time granting to attorneys Flanagan & Sampson, as amici curiae for an interested party, leave to file a brief in support of the contention that no judgment should be entered against defendant Foothill Supply Company, and permitting plaintiffs' attorneys to file a brief in opposition to the just-mentioned contention. When the matter was called for hearing on February 4, 1938, plaintiffs moved the court to enter judgment against the defaulting defendant, the Foothill Supply Company, which motion was by the court denied and judgment was entered in favor of such defaulting defendant.

We are therefore called upon to determine the effect upon a principal whose default has been entered of a judgment in favor of and exonerating an agent of such defaulting defendant; or in other words, does such a judgment in favor of the agent, ex proprio vigore, relieve the defaulting principal of responsibility, and may such judgment in favor of the agent who is charged with being primarily liable be availed of by the allegedly secondarily liable and defaulting principal?

[1,2] Appellants' main contention is that in an action such as this for personal injuries brought against employer and employee, based on negligence of the latter in operating an automobile, defenses raised in an answer filed by the defendant charged with being the primarily responsible employee resulting in his exoneration do not enure to the benefit of the secondarily liable and defaulting employer. This claim on the part of appellants cannot be sustained. This action, so far as the defaulting employer was concerned, was predicated upon the sole theory of respondeat superior. The defenses interposed by the answering defendant employee were not personal to himself (as are the defenses of infancy, coverture, or bankruptcy on the part of the pleader), but they were common to both the answering defendant and his employer who defaulted. In other words, the defenses interposed by the answering defendant went to the whole right of the plaintiff to recover at all, as distinguished from his right to recover as against any particular defendant. The defenses interposed by the answering defendant in the case before us questioned the validity or merits of plaintiffs' entire cause

of action in general, and when such defenses prove successful they enure to the benefit of the defaulting defendant, and final judgment must therefore be entered not only in favor of the answering defendant, but in favor of the defaulting defendant as well. After verdict and judgment for the defendant who pleads in cases such as this, the plaintiff cannot take judgment against the defendant in default, for the reason that upon the whole record it appears that plaintiff has no right of action. Nicholls v. Anders, 13 Cal.App.2d 440, 56 P.2d 1289; Davison v. Diamond Match Co., 10 Cal.App.2d 218, 51 P.2d 452; Bradley v. Rosenthal and Sunset Telephone & Telegraph Co., 154 Cal. 420, 425, 97 P. 875, 129 Am.St.Rep. 171; Reinhart v. Lugo, 86 Cal. 395, 24 P. 1089; Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 328 Mo. 782, 41 S.W.2d 1049, 78 A.L.R. 930, 937. Where, as in the instant case, the real actor, who is liable personally notwithstanding his acting for his employer, is not guilty, it necessarily follows that his employer for whom he was acting cannot be held. Certainly it would not be fair or just to enter a judgment upon default against a defendant who is only secondarily liable, if liable at all, until there is a successful determination of the suit against a defendant charged with being primarily liable. 34 Cor.Jur., pp. 150, 151, § 357. Plaintiffs having elected to present their application for final judgment against the defaulting defendant in connection with the trial of the action as to the answering and allegedly primarily liable defendant York, and to allow the jury to assess the damages, if any, at that time, the court properly instructed the jury that as a prerequisite to their assessing damages against the defaulting defendant, they should determine the question of liability of the answering and primarily liable defendant. By their verdict, the jury, in determining that the defendant charged with being primarily liable was not responsible for damages suffered by the plaintiffs, thereby established that plaintiffs had no cause of action growing out of the accident in question against any of the defendants involved therein, and the trial court was correct in refusing to enter a final judgment in favor of such plaintiffs against the defaulting defendant.

[3] We find no prejudicial error in the action of the trial court permitting attorneys for the defaulting defendant to present argument and a brief in opposition to plaintiffs' motion for entry of final judgment against such defendant.

[4] The purported appeal from the order denying plaintiffs' motion to enter final judgment against the Foothill Supply Company, defaulting defendant, is dismissed for the reason that the questions raised thereby have been determined upon the appeal from the judgment.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

---

33 Cal.App.2d 416

## BROWN v. BOYD, Controller, et al.

Civ. 11030.

District Court of Appeal, First District,
Division 2, California.

June 19, 1939.

Rehearing Denied July 19, 1939.
Hearing Denied Aug. 17, 1939.

**1. Municipal corporations 🔑184(2)**

After expiration of the civil service list of eligibles for appointment to position of captain in San Francisco police department expired by lapse of four-year period established in city charter, no valid appointment to position of police captain could be made from such list. St.1931, p. 3062, § 145.

**2. Constitutional law 🔑70(3)**

If constitutional limitations reserving to city electors the power of referendum over ordinances creating public offices and relating to salary, term, or duties of officers, deny to supervisors the power to make the ordinances as urgency measures, the economic questions of expediency, like questions of good faith and motives, are beyond judicial concern. Const. art. 4, § 1; art. 11, §§ 6, 8, 11.

**3. Municipal corporations 🔑108**

The constitutional provision reserving to electors of municipality the power to exercise referendum on measures creating public officers and relating to salary, term, or duties of officers was fully operative where municipality in its charter made no provision for exercise of such power inconsistent with Constitution, notwithstanding other constitutional provisions specifying what the municipality might regulate by charter. Const. art. 4, § 1; art. 11, §§ 6, 8, 11.

**4. Municipal corporations** ⚷108

Under constitutional provision that city charters must be consistent with and subject to Constitution, constitutional reservation of power of referendum over measures creating public offices and relating to salary, term, or duties of officers was read into and became a part of charter of city and county of San Francisco with the same effect as though expressly incorporated therein. Const. art. 4, § 1; art. 11, § 8.

**5. Municipal corporations** ⚷108

The San Francisco charter could not by definition or otherwise limit reserved powers of referendum, notwithstanding that charter could extend limitations upon powers of supervisors and thereby add to reserved powers in the electors. Const. art. 4, § 1.

**6. Municipal corporations** ⚷180(1)

A police captain is a "public officer." Pen.Code, § 817.

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

**7. Municipal corporations** ⚷126, 214(1)

The word "position" in San Francisco charter relating to creation of new positions embraces officers and employees. St.1931, p. 3062, § 143.

[Ed. Note.—For other definitions of "Position," see Words & Phrases.]

**8. Municipal corporations** ⚷180(1)

The word "officer" in San Francisco charter provision relating to police department included captain of police. St.1931, p. 2997, § 35.

**9. Municipal corporations** ⚷108

San Francisco emergency ordinances creating three additional positions as captains of police and appropriating funds to pay salaries attached to positions were invalid as depriving electors of their constitutional power of referendum on measures creating public offices and relating to salary, term, or duties of officers. St.1931, p. 2973; Const. art. 4, § 1; art. 11, §§ 6, 8, 11.

**10. Municipal corporations** ⚷995(1)

A taxpayer showing that San Francisco ordinances purporting to create three new positions of police captains were void could maintain action to restrain payment of salaries attached to such offices under statute authorizing action by taxpayer to restrain illegal expenditure of public funds. St.1931, p. 2973; Code Civ.Proc. § 526a.

---

Appeal from Superior Court, City and County of San Francisco; James L. Atteridge, Judge.

Suit by W. L. Brown against Harold J. Boyd, as Controller of the City and County of San Francisco, State of California, and others, to restrain the municipal officers of the City and County of San Francisco from paying the salary attached to the office of captain of police to one alleged to have been illegally promoted from a lieutenancy. From a judgment for the defendants, the plaintiff appeals.

Reversed.

Grover O'Connor, of San Francisco, for appellant.

John J. O'Toole, City Atty., Thomas P. Slevin, Deputy City Atty., and Louis V. Crowley, all of San Francisco (Cooley, Crowley & Supple, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiff sued as a taxpayer, under section 526a of the Code of Civil Procedure, to restrain the municipal officers of the city and county of San Francisco from paying the salary attached to the office of captain of police to one alleged to have been illegally promoted from a lieutenancy. The defendants had judgment. The plaintiff's appeal raises a great many points which we will leave undecided as the grounds herein covered are sufficient for the purposes of the decision. These are the invalidity of the ordinances creating the position, and the right of the plaintiff to sue.

[1, 2] On December 11, 1933, the civil service list of eligibles for appointment to the position of captain in the police department expired by lapse of the four-year period established in section 145 of the city charter. Thereafter no valid appointment to the position of captain could be made from such list. Mann v. Tracy, 185 Cal. 272, 273, 196 P. 484; Jensen v. Civil Service Comm., 4 Cal.2d 334, 336, 49 P.2d 283. On December 11, 1933, two purported emergency ordinances were introduced, adopted, and approved by the

board of supervisors and the acting mayor, respectively, one creating three additional positions as captain of police by amending the "annual salary ordinance", the other appropriating $7,000 out of the special fund for payment of the salaries of three additional police captains, which positions were also "created" by this ordinance, at a monthly compensation therein fixed at $300 each. Both ordinances declared the existence of an emergency in that the "uninterrupted operation of the police department requires the creation of such positions * * * and because of the imminent expiration of the civil service list of eligibles for captains". The purpose of thus declaring an emergency was to avoid the provisions of section 13 of the charter that an ordinance other than an emergency measure shall be passed only after two readings and separate votes thereon held at least ten days apart. On the same day that these ordinances were passed the police commission appointed and promoted to the three new positions the three lieutenants in the department who ranked highest on the expiring civil service list. Thereupon the three were installed as captains and salary warrants calling for the payment of $300 were issued monthly to each, but, pursuant to an oral agreement made before these proceedings were initiated, all three returned to the city treasurer monthly the difference between the salary fixed to be paid to a lieutenant and the salary of a captain, this arrangement to hold until vacancies regularly occurred in the position of captain to which these individuals could be "regularly" appointed. It is the position of the appellant that the entire plan outlined in these proceedings was conceived and executed for the sole purpose of giving preference to these three lieutenants over those who might thereafter become eligible for promotion to captaincies as a result of a new civil service examination, and that the official declaration of an emergency was a mere pretense to effect this unlawful purpose. The city replies that its declaration cannot be questioned in this proceeding, that the plan as carried out relieved the city of the expense and delay of conducting a new examination, and that, by reason of the refund of the extra salaries, the taxpayer has not been injured. All these considerations fall before the single question of "power". If the constitutional limitations (reserving to the electors of the city the power of referendum over these ordinances) deny to the supervisors the power to make the enactments as urgency measures, the economic questions of expediency, like the questions of good faith and motives, are beyond judicial concern.

Section 1 of article IV of the Constitution provides generally for the reservation in the people of the right of the initiative and referendum. The section is long and comprehensive, and we refer to such portions only as seem to be pertinent. After defining the power so reserved and providing procedure for its operation in reference to matters of state-wide concern, the section declares: "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. * * * Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of section eight of article XI of this Constitution." The section is made self-executing, and it is expressly provided that no legislation may be enacted limiting or obstructing "the powers herein reserved". We should pause here to note that the powers so reserved are powers resting in the people and the electors and not powers resting in the legislature or in the corporate agencies of the state. The powers resting in cities and cities and counties exercised under their respective charters, and expressly saved by the section, are the powers conferred by other sections of the Constitution and which are in no wise inconsistent with these powers reserved to the people.

In defining the operation of the power of referendum the section declares that certain urgency measures may be excepted from its restrictions, but in this connection it is expressly declared that "no measure creating or abolishing any office or changing the salary, term or duties of any officer, * * * shall be construed to be an urgency measure".

Section 8 of article XI of the Constitution permits a city, or a city and county, to frame a charter for its own government "consistent with and subject to this Constitution". Section 6 of the same article authorizes cities and cities and counties operating under charters so adopted "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters". Section 11 of the same article gives to such bodies the power to enact local police, sanitary, and similar regulations.

Conformably with these constitutional provisions the city and county of San Francisco adopted a new charter effective January 8, 1932. Stats.1931, p. 2973. Section 179 of this charter preserved the right of the electors to initiate legislation, gave the supervisors the power to refer an ordinance to the electorate, but did not provide for the exercise of the constitutional power reserved to the electors by way of a referendum (except as to ordinances granting franchises). Section 13 of this charter required that an ordinance should not be passed until "after two readings and votes at separate meetings of the board, which meetings shall be at least ten days apart. * * * Annual budget and appropriation ordinances shall be passed only after two readings, not less than five days apart." The same section makes an exception to the first restriction mentioned in case of emergencies as defined in section 16. This section declares that no ordinance affecting franchises, grants, or bond issues shall be passed as an emergency measure and specifies as emergencies certain police regulations and "provision for the uninterrupted operation of any city and county department or office, or action required to comply with time limitations as established by law".

[3] We should pause here to note that, though the charter did not recognize the full reserved power in the electors declared by section 1 of article IV of the Constitution, it does specify a procedure in sections 13 and 16 for the enactment of ordinances which is somewhat similar to the provisions of the Constitution, and that, though it does define certain circumstances which may be deemed as emergencies, it does not differ from the constitutional declaration that "no measure creating or abolishing any office or changing the salary, term or duties of any officer * * * shall be construed to be an urgency measure". On this phase of the case it would seem to follow necessarily that, where the state reserved to the electors of the municipality the power to exercise the referendum on measures creating public offices and relating to the salary, term or duties of officers, and, when the municipality in its charter made no provision for the exercise of that power inconsistent with the declaration in the Constitution, that irrespective of the provisions of article XI of the Constitution specifying what the city might regulate by charter, the failure of the city to so act leaves the provision of article IV fully operative.

But we need not rest our decision upon this somewhat narrow ground that, from the failure of the city to act under article XI, it must be denied the power to legislate free from the constitutional restriction. We prefer to rest it upon the ground that the Constitution has reserved this power to the electors of the city and that all charters adopted under article XI must be "consistent with and subject to this Constitution". For this view we have ample authority from the courts of this state, and for that reason we disregard without comment the authorities cited from other jurisdictions.

In Hopping v. City of Richmond, 170 Cal. 605, 609, 610, 150 P. 977, 978, our Supreme Court, having this same question before it, said: "The people of the city of Richmond derive the power of referendum from its charter adopted and approved by the Legislature in 1909, and from the amendment of section 1, art. 4 of the state Constitution, adopted October 10, 1911." And again, "So far as the final clause of section 1, of art. 4, reserves the powers of initiative and referendum to the people of cities, it refers back to the opening clause for a description of the powers so reserved, and the power of the people of the cities must therefore be deemed to be the same in character as that described in the opening clause with reference to the people of the state, that is to say, it applies only to the acts of the city council, or other legislative body of the particular city, which are exercises of its legislative power." And again: "The declaration of the Constitution that its provisions do not affect or limit the referendum power reserved to the people of any city by its charter does not limit the constitutional reservation, nor enlarge those reserved by such charter. The two reservations are thereby made independent of each other. The constitutional reservation goes to the full extent expressed by its language. If the charter differs from the Constitution in any respect, it does not thereby diminish the power reserved by the Constitution. On the other hand, if the powers reserved by the charter exceed those reserved in the Constitution, the effect of the charter would be to give to the people the additional powers there described. Long v. Portland, 53 Or. 92, 98 P. 149, 1111."

In full accord is Hill v. Board of Supervisors, 176 Cal. 84, 86, 167 P. 514, 515, where the court said: "And, finally, it is self-evident that the Legislature itself could not abridge, nor even hamper, the exercise of those powers by any of the subordinate mandatories of the state—first, because the reservation, being in the Constitution, is not subject to such legislative abridgement; and, second, because the Constitution in terms declares that the Legislature shall have no authority to limit or restrict the powers reserved." To the same effect are Garver v. Williams, 96 Cal.App. 118, 120, 273 P. 604; People v. Elkus, 59 Cal.App. 396, 404, 211 P. 34; Shay v. Roth, 64 Cal.App. 314, 323, 221 P. 967; Harder v. Denton, 9 Cal.App.2d 607, 608, 51 P.2d 199.

Another line of decisions, some of which are cited in Voorhees v. Morse, 1 Cal.2d 179, 189, 34 P.2d 153, holds that, when a city avails itself of the privilege of making itself independent of general laws in respect to its municipal affairs in a charter adopted under sections 6 and 8 of article XI of the Constitution, it is nevertheless subject to other limitations provided in the Constitution. All the cases cited by respondents holding generally that when a city proceeds under article XI, its charter becomes "all embracing and unrestricted as to its municipal affairs" have reference to the supremacy of the charter over general laws in respect to municipal affairs and do not controvert the rule that such charters are subject to the limitations of the Constitution.

[4, 5] From the foregoing it follows that when the city and county of San Francisco adopted its present charter "consistent with and subject to" the Constitution, the constitutional reservation of the power of referendum was read into and became a part of the charter with the same effect as though it had been expressly incorporated in the charter. By the same reasoning, when the Constitution declared that "no measure creating or abolishing any office or changing the salary, term or duties of any officer" should be construed as an urgency measure, it in express terms defined in part what that reserved power of referendum should be. Thus, though the city charter could extend the limitations upon the powers of the supervisors and thereby add to the reserved powers in the electors, it could not, by definition, or otherwise, limit that reserved power. This being so it follows that the ordinances under attack are invalid if they create an office or change the salary, term, or duties of an officer.

[6-9] That a police captain is a public officer goes without question. This has been decided long before the adoption of section 1 of article IV. Farrell v. Board of Trustees, 85 Cal. 408, 416, 24 P. 868; Logan v. Shields, 190 Cal. 661, 665, 214 P. 45; Maggi v. Pompa, 105 Cal.App. 496, 501, 287 P. 982; Black v. Board of Police Commissioners, 17 Cal.App. 310, 313, 119 P. 674; Noble v. City of Palo Alto, 89 Cal.App. 47, 52, 264 P. 529; Pen.Code, § 817; 21 Cal.Jur., p. 389. In the case of Farrell v. Board, supra, it was held that the creation of a police captaincy was a legislative act. By the provisions of section 143 of the San Francisco charter the only method for the creation of new positions in any department is by "appropriation ordinance of the board of supervisors". It was by such method that the supervisors purported to create these three new captaincies. We will not quibble over the use of the word position instead of office, because here there is no distinction. The word position was used in the section to embrace both officers and employees. Section 35 of the charter, which relates to the police department only, uses the three expressions,—position, officer, and employee. It designated the "private" a "police officer". If a captain is not an officer the word has been incorrectly used since the adoption of the codes in 1872, and we cannot conceive what member of the police force is referred to in section 35 as an officer if not a captain of police. The first ordinance purported to create three additional offices in the police department. It was such an ordinance as could not be declared an urgency measure under the constitutional limitation. It was void in its inception, and the second ordinance, purporting to appropriate funds to pay salaries attached to such offices, would fall with the first.

[10] The respondents make a veiled attack upon the status of appellant's appearance herein as a taxpayer of the city and county. The allegation of the com-

plaint to that effect was denied for lack of information and was found by the trial court to be true. His capacity to sue as such is expressly stated in section 526a of the Code of Civil Procedure. Having shown that the ordinances purporting to create the new positions were void, and that the appointment of the three lieutenants to those positions was for that reason invalid, the taxpayer has made a case coming squarely within the code section because payment of compensation to these individuals under such circumstances would be an "illegal expenditure" of the public funds of the city. This conclusion rests upon the ancient doctrine announced in Zottman v. City of San Francisco, 20 Cal. 96, 102, 81 Am.Dec. 96, that "the mode in such cases constitutes the measure of the power". If the city was without power to create the positions in the manner followed, the payment of compensation to the occupants is beyond the power of the city authorities, and hence subject to restraint under the code section.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

33 Cal.App.2d 397

## PEOPLE v. HECTOR.

Cr. 2076.

District Court of Appeal, First District, Division 2, California.

June 19, 1939.

Rehearing Denied July 1, 1939.

Hearing Denied July 18, 1939.

**Indictment and Information 🔑87(4)**

An information filed December 4, 1920, wherein the allegation of time of the offense, as October 30, 1920, was followed by the word "seventeen" in parentheses, did not affirmatively show that statute of limitations had run, so as to authorize setting aside the judgment of conviction on motion after sentence had been served.

---

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Andrew H. Hector was convicted of second-degree burglary, and moved to set aside the judgment of conviction. From an order denying the motion, defendant appeals.

Affirmed.

A. H. Hector, in pro. per.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was convicted of the crime of burglary in the second degree and was sentenced to imprisonment in San Quentin on March 11, 1921. It appears from the statements in the briefs that he has served his sentence for said offense, and that he is now serving a sentence for some other offense. In 1939, defendant filed a motion to set aside the judgment of conviction, which motion was noticed for March 6, 1939. The motion was denied and defendant appeals from the order denying said motion.

The motion to set aside the 1921 judgment was based upon the claim that the information in said proceeding affirmatively showed upon its face that the statute of limitations had run prior to the filing of said information. Defendant cited and relied upon People v. McGee, 1 Cal.2d 611, 36 P.2d 378 and People v. Hoffman, 132 Cal.App. 60, 22 P.2d 229 in support of said motion. Defendant now contends that the trial court erred in denying said motion, but, upon the record before us, we find no error in the trial court's ruling.

The record purports to contain a certified copy of the information which was filed on December 4, 1920. In so far as the date of the commission of the offense is concerned, said copy of the information reads as follows: "The said Andrew Hector, on or about the 30th day of October, A. D. Nineteen hundred and Twenty," which words are followed by the word "Seventeen" in parentheses. In making his motion defendant claimed that the information alleged that the offense was committed in 1917 rather than in 1920. The district attorney claimed that there had been a fraudulent alteration of the information for the purpose of said motion. Taking the information, as certified in the record, the most that can be said is that uncertainty may have existed by reason of the insertion of the word "Seventeen" in parentheses following the word "Twenty". It does not appear that the uncertainty, if any uncertainty existed at the time, was called to the attention of the trial court during the trial of the action in which defendant was convicted but, in any event, defendant cannot sustain his claim, upon the record here, that said information affirmatively showed that the statute of limitations had run.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 390

**CHAMBERS v. ASHLEY, City Clerk, et al.**

**Civ. 2329.**

District Court of Appeal, Fourth District, California.

June 16, 1939.

**1. Evidence 🔑45**

The District Court of Appeal may take judicial notice of the public records of the City of San Diego pertaining to the election of a municipal judge. Code Civ.Proc. § 1875.

**2. Appeal and error 🔑781(4)**

The question involved on petitioner's appeal from adverse judgment in mandamus proceeding to compel city clerk of the city of San Diego to keep name of candidate for municipal judge from ballot in city primary and final elections became moot after elections were held and candidate was elected, and appeal was subject to dismissal. Code Civ.Proc. § 1875.

**3. Appeal and error 🔑781(1)**

An appeal involving a question which had become moot would be dismissed notwithstanding that propriety of portion of judgment awarding costs allegedly remained open for consideration, since reversal of judgment would be a useless act in that appellant could not have judgment and hence could not recover costs.

---

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Charles C. Haines, Gordon Thompson, Frank J. Macomber, L. N. Turrentine and Edward J. Kelley, Judges.

Mandamus proceeding by Claude L. Chambers, petitioner, against John M. Ashley, as City Clerk of the City of San Diego, California, and Clarence F. Terry, to compel the City Clerk to refrain from putting the name of the Honorable Clarence F. Terry, a candidate for municipal judge to succeed himself, on the ballot to be used in the city primary election wherein petitioner filed an amendment praying that the name of Judge Terry be omitted from the ballot to be used in the final city election. Judgment for defendants, and petitioner appeals.

Appeal dismissed.

Charles C. Crouch, of San Diego, for appellant.

D. L. Ault, City Atty., H. B. Daniel, Asst. City Atty., Hervey & Holt, and Wright, Monroe, Harden & Thomas, all of San Diego, for respondents.

MARKS, Justice.

This is a motion to dismiss this appeal from a judgment entered in favor of respondents. The motion is made on the grounds (1) that the question to be decided is moot, and (2) that mandamus is not the proper remedy in this proceeding to determine necessary qualifications for office.

On March 14, 1939, petitioner filed his petition with the county clerk of San Diego county asking for a writ of mandate requiring respondent John M. Ashley, as city clerk of the City of San Diego, to refrain from putting the name of the Honorable Clarence F. Terry, a candidate for municipal judge to succeed himself, on the ballot to be used in the city primary election to be held on March 28, 1939. An order to show cause was issued returnable on March 18, 1939. On that day petitioner filed an amendment to the prayer of his petition and prayed that the name of Judge Terry be omitted from the ballot to be used in the final city election.

Respondents filed a demurrer and an answer. The demurrer was sustained, the order to show cause was dismissed, and judgment was entered for respondents.

[1] We may take judicial notice of the public records of the city of San Diego pertaining to the election of a municipal judge. Sec. 1875, Code Civ.Proc.; People

v. Knoblock, 11 Cal.App. 333, 104 P. 1012; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; Wood v. Kennedy, 117 Cal.App. 53, 3 P.2d 366.

[2] The city primary election was held on March 28, 1939. Judge Terry was one of the successful candidates who was nominated. The city election at which he was elected to the office of municipal judge of the city of San Diego was held on April 25, 1939. A certificate of election was issued to him on May 2, 1939, and he qualified for the office which he is now filling.

It is obvious that no writ could be issued now that would keep the name of Judge Terry off the city primary or the city election ballots. Those elections have long since passed and Judge Terry's name appeared on those ballots. The petition in this proceeding has no other purpose than to keep his name from appearing on those ballots. The question thus presented is moot and no court can grant the relief sought. There is nothing which we can decide here.

[3] Petitioner urges that as respondents were given judgment in the trial court for their costs, the propriety of that portion of the judgment remains for consideration and is not moot. It is argued that this is sufficient ground for our denial of the motion to dismiss the appeal. He cites Cohen v. Gray, 54 Cal. 595, in support of this contention.

This argument fails to impress us. If the judgment should be reversed the case would be returned to the superior court for trial. The relief sought could not be granted there as the elections are over and Judge Terry's name appeared on the ballots used in both of them. Nothing can change that fact and the question presented in the petition would be as moot in the superior court as it is here. As petitioner could not have judgment he could not recover costs. A reversal of the judgment would be a useless act and would only increase the court costs which petitioner would be required to pay instead of relieving him from the present judgment against him for costs.

Our conclusion that the question presented on this appeal is moot makes it unnecessary for us to consider the second ground for the dismissal of the appeal.

The appeal is dismissed.

I concur: BARNARD, P. J.

---

33 Cal.App.2d 439

## TAYLOR et al. v. KISNER.

Civ. 6271.

District Court of Appeal, Third District, California.

June 19, 1939.

**Appeal and error** ⇐1058(2)

Where vendor sought to clear title to land on ground that option to purchase was terminated by failure to make payments, alleged error of trial court in sustaining objection to question asked purchaser as to whether he had any conversation with attorney for vendor respecting option to buy was not prejudicial where witness had previously testified as to conversations with attorney for vendor.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action to quiet title by Frank L. Taylor and George C. Stephens against Vernon L. Kisner. The defendant filed a cross-complaint. From a judgment for the plaintiff and against the defendant on his cross-complaint, the defendant appeals.

Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action to quiet title to real property. Defendants filed a cross-complaint, praying for a declaratory judgment to the effect that he is owner of said property. Judgment went for plaintiffs, and all relief was denied defendant. The appeal is from the judgment.

The sole ground urged for reversal is alleged error arising out of the exclusion of evidence sought to be introduced by defendant.

The controversy arose over the proposed sale of the real property by plaintiffs to one M. T. Minney. The former held title as trustees for Bay Farm Island Bondholders' Committee. Most of the negotiations were held between W. F. Williamson, attorney for plaintiffs, and Minney. No formal contract was ever executed, the contention of appellant being that the several letters between the parties and to the title company constituted a contract of sale. It was the contention of respondents that no such contract ever was entered into, and that they merely granted an option to purchase the property. In any event, the negotiations finally resulted in the depositing in escrow by respondents of a deed to the property, with instructions to deliver the same to Minney upon the payments of certain amounts on the purchase price upon certain dates. Appellant failed to make the payments as specified, and respondents took the position that the option was terminated, and brought this action. The trial court found for plaintiffs on all issues, and the findings are not assailed here. Defendant is the assignee of Minney.

At the trial plaintiffs proved their record title. Defendant called Minney as a witness to support the allegations of their cross-complaint that there was a contract of sale and purchase, and rested. Plaintiffs, in defense to the cross-complaint, called attorney Williamson, who testified that there had been some discussion of an "option" between him and Minney. After plaintiffs had rested, defendant again called Minney to the witness stand, and the following question was asked him: "Mr. Minney, did you ever at any time have any conversation with Mr. Williamson respecting an option to buy this property?" An objection was sustained, upon the ground that the subject had already been covered. Respondents contend that the ruling was without prejudice for the reason that the proffered evidence was cumulative. They call attention to the fact that the witness had previously appeared as a witness for appellant and had been asked several times to state any conversations he had with Williamson in respect to the property. For instance, counsel for appellant asked this question of witness Minney: "Now, Mr. Minney, you had some conversation, did you not, with Williamson respecting this property?" No objection was made, and the witness was permitted to answer in respect to any such conversations. Shortly thereafter, this witness was again interrogated concerning another conversation with Williamson. It would thus appear that the proposed question called for evidence upon a matter which had been quite thoroughly gone into and exhausted. Williamson had testified to all conversations had between him and Minney. It is true that the testimony sought to be brought out is rebuttal in its nature. However, the question had, in effect, already been asked and answered previously when appellant put on his case under the cross-complaint, and it would inure to his benefit with the same potency as though it were introduced in rebuttal. We cannot say that any prejudice resulted from the ruling. Whether or not the parties labeled the transaction as an "option" or as a "contract" is not the important consideration. The letters and other writings are the controlling elements here, and they point very definitely to the conclusion which the trial court reached—that there was no agreement of purchase and sale, but merely an option. The contention is without substantial merit.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

33 Cal.App.2d 399

## HASKELL et al. v. FIRST NAT. BANK IN OAKLAND et al.

Civ. 11016.

District Court of Appeal, First District, Division 2, California.

June 19, 1939.

Hearing Denied Aug. 17, 1939.

**1. Appeal and error ⚷1040(10)**

A judgment establishing constructive trust in realty in favor of plaintiffs would not be reversed for failure to sustain defendants' special demurrer raising issue that plaintiffs could not rely on both express and resulting trust, where cause of action was based on constructive trust, and allegations objected to related to circumstances leading up to creation of such a trust and defendants were fully informed before trial of circumstances upon which plaintiffs would rely to prove their case.

**2. Appeal and error ⚷1170(3)**

The appellate court will not reverse a judgment on ground that special demurrer should have been sustained, where matters objected to did not affect conduct of trial and error complained of did not result in miscarriage of justice. Const. art. 6, § 4½.

**3. Appeal and error ⇔1170(10)**

Where ultimate fact upon which cause of action was based was that land was held by defendant as constructive trustee for plaintiffs and such fact was found as alleged, alleged error in finding a resulting trust was unsubstantial. Const. art. 6, § 4½.

**4. Trusts ⇔17(8)**

Although a trust of an interest in land is orally declared and no memorandum is signed, trust is enforceable if, with consent of trustee, the beneficiary enters into possession of land or makes valuable improvements thereon or irrevocably changes his position in reliance on trust.

**5. Trusts ⇔53**

An oral trust in land is not a nullity but is voidable at election of voluntary trustee, and doctrine of equitable estoppel is applicable where such trustee has by his conduct ratified and affirmed trust and induced others to change their position because of it.

**6. Trusts ⇔99**

A dwelling house which deceased purchased as home for friend and title to which deceased stated she held as trustee for friend was subject to constructive trust in favor of friend under principle of equitable estoppel, where friend and her family moved into house and occupied it rent free and made substantial and permanent improvements and paid insurance and taxes.

---

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Suit by Daisy Haskell and others against the First National Bank in Oakland, a national banking institution, as trustee, etc., and others, to establish that certain realty standing in the name of Lois Atwell, deceased, was held by the First National Bank in Oakland as trustee under the will of Lois Atwill, deceased, as a constructive trustee for the plaintiffs. From the judgment, the defendants appeal.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Thornton Wilson, of Oakland, for appellants.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to have it established that certain real property standing in the name of Lois Atwell (deceased) was held by the defendant bank, as trustee under the will of Mrs. Atwell, as a constructive trustee for these plaintiffs because of an express or resulting trust created by the deceased whereby she undertook and assumed to hold the property as a voluntary trustee for these plaintiffs. The property in suit was purchased by the deceased for the benefit of the plaintiffs, and they were put in possession under an oral promise of the deceased that she would hold the property as trustee for them. The bank holds under a testamentary trust of all the residue, the particular property in suit not having been described in the testamentary trust. The plaintiffs had judgment subject to the equities of the heirs of the deceased arising out of payments advanced under the testamentary trust.

[1, 2] Appellants argue that the judgment should be reversed because their special demurrer, raising the issue of ambiguity, and that several causes of action were improperly united and not separately stated, should have been sustained. Their theory is that the respondents should have been compelled to tie their cause of action to either an express or a resulting trust in Mrs. Atwell, and that they could not rely upon both in the same cause of action. Of course, the cause of action is based upon the claim of a constructive trust in the appellants. The allegations objected to relate to the circumstances leading up to the creation of that trust. But one cause of action is stated, and the appellants were fully informed before the trial of the circumstances upon which the respondents would rely to prove their case. We will not reverse a judgment on the ground that a special demurrer should have been sustained when it appears that the matters objected to did not affect the conduct of the trial and that the error complained of has not "resulted in a miscarriage of justice". Const., art. VI, § 4½.

[3] By the same reasoning, if the trial court erred in finding a resulting trust in Mrs. Atwell, and the evidence discloses the existence of an express trust in the same person, for the same purposes, and for the same beneficiaries, the error is unsubstantial, because the ultimate fact upon which the cause of action is based is the constructive trust in appellants. This fact having been found as alleged, the right to the relief sought is established, and that closes the case so far as appellants are concerned.

The essential facts, which were proved by competent evidence and are undisputed, are these: Daisy Haskell had been raised from childhood in the home of Mrs. Atwell, who treated her as a daughter. In 1925 Mrs. Atwell expressed the desire of purchasing a home for Daisy and her family, but insisted that it be held in trust for the benefit of Daisy and her children and not subject to the debts of Mr. Haskell. Mrs. Atwell and Mrs. Haskell searched for a year for a suitable home, and, in 1926, the property in suit was purchased by Mrs. Atwell in her own name and the Haskells were put in exclusive possession. They gave up their former home, made substantial and permanent improvements on the new place, paid the insurance and taxes, and were permitted to occupy the premises rent free. A room was provided for Mrs. Atwell, who expressed the intention of living with the Haskells. On many occasions she declared to numerous witnesses that she held title to the property as trustee for Mrs. Haskell and her children and that she had executed a deed to protect the interests of the beneficiaries. In her will executed on March 10, 1928, she recited that: "I have heretofore deeded certain property known as number (255) Ridegway Avenue, Oakland, California to my friend Daisy A. Haskell, with provision in said deed for the final distribution of said property upon the death of said Daisy A. Haskell. In addition thereto I hereby direct my said trustee to pay to said Daisy A. Haskell during the remainder of her natural life, should she survive me, the sum of * * *."

Mrs. Atwell died on October 28, 1928, but the deed mentioned in her will and in her frequent conversations was not found. She did not at any time, however, by word or deed, repudiate the trust, alter her expressed intention of her trusteeship, or give to the beneficiaries any indication that they could no longer rely upon her frequent promises.

[4] The case is controlled by the principles found in Restatement of the Law of Trusts, volume I, pages 149, 150, section 50, reading: "Although a trust of an interest in land is orally declared and no memorandum is signed, the trust is enforceable if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust."

[5, 6] As stated in the section the rule is similar to the rule under which oral gifts of land or contracts for the sale of land become enforceable on the ground of part performance. But underlying all this reasoning is the principle that an oral trust in land is not a nullity but is voidable at the election of the voluntary trustee, and when such trustee has by his conduct ratified and affirmed the trust and induced others to change their position because of it, the doctrine of equitable estoppel comes into play.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

33 Cal.App.2d 465

## TEHAMA COUNTY v. PACIFIC GAS & ELECTRIC CO.

Civ. No. 6170.

District Court of Appeal, Third District, California.

June 23, 1939.

Rehearing Denied July 22, 1939.

Hearing Denied Aug. 21, 1939.

**1. Pleading 🔑34(4)**

Upon demurrer, allegations of complaint must be construed most strongly against pleader.

**2. Taxation 🔑156**

Where company, authorized by franchise to operate system of electric lines in certain county free from franchise taxes, acquired another company operating under a subsequent franchise granted for same purpose on utility's purchase of properties and franchises of both companies, it was not necessary that lines operated by company subject to franchise taxes be dismantled and replaced with equipment of utility's own construction to avoid franchise taxes under the subsequent franchise, notwithstanding that such action would be conclusive evidence of intent to abandon subsequent franchise. St.1905, p. 777; Civ.Code, § 3532.

**3. Franchises 🔑11**

So long as a public service is not discontinued, a franchise may be either lost or abandoned by subsequent conduct.

**4. Franchises** ⟹11

Question of the abandonment of a franchise must be determined from the intention of the parties ascertained from the declarations and conduct.

**5. Taxation** ⟹156

Where company, authorized by franchises to operate system of electric lines in certain counties free from franchise taxes, acquired another company operating under subsequent franchise granted for same purpose, but subject to franchise taxes, and properties and franchises of both companies were purchased by utility which operated consolidated system for 22 years without demand being made for franchise taxes, state's neglect to demand taxes and utility's refusal to pay and continuance to operate entire system under the prior franchise indicated intention to abandon subsequent franchise, and hence utility was not liable for franchise taxes. St.1905, p. 777; p. 778, § 3.

**6. Taxation** ⟹156

Where company, authorized by franchise to operate system of electric lines in certain counties free from franchise taxes, acquired another company operating under subsequent franchise granted for same purpose but subject to franchise taxes, and properties and franchises of both companies were purchased by utility which operated consolidated system for 22 years without payment or demand of franchise taxes, constitutional prohibition against Legislature passing any law permitting alienation of franchise so as to relieve franchise or properties from liability was not applicable in determining whether utility was liable for franchise taxes under subsequent franchise which it acquired. St.1905, p. 777; Const. art. 12, § 10.

**7. Franchises** ⟹8

Constitutional prohibition against Legislature passing any law permitting alienation of franchise so as to relieve franchise or properties from liabilities of grantor or grantee does not prohibit sale or transfer of franchise. Const. art. 12, § 10.

**8. Franchises** ⟹11

Constitutional prohibition against Legislature passing any law permitting alienation of franchise so as to relieve franchise or properties from liabilities of grantor or grantee does not prevent the abandonment of a franchise, except where public service is discontinued or when the enterprise affected thereby is relieved of obligations or liabilities previously incurred in the operation of the industry. Const. art. 12, § 10.

**9. Franchises** ⟹8, 11

Constitutional prohibition against Legislature passing any law permitting alienation of franchise so as to relieve franchise or properties from liabilities of grantor or grantee does not prevent acquisition of the franchise and abandoning it so as to continue service of business under former valid franchise which covers all benefits and privileges secured thereby. Const. art. 12, § 10.

**10. Limitation of actions** ⟹11(2), 24(2)

Where utility operated consolidated electric system for 22 years without payment or demand for franchise taxes, county's action for franchise taxes was barred by statute of limitations. Code Civ.Proc. § 345.

---

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Suit by the County of Tehama, a political subdivision of the State of California, against the Pacific Gas & Electric Company, a corporation, for an accounting and to recover franchise taxes. From an adverse judgment, defendant appeals.

Reversed with directions.

Thomas J. Straub, W. H. Spaulding, and Paul E. Sloane, all of San Francisco, for appellant.

Clair Engle, Dist. Atty., of Red Bluff, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against it for failing to answer the complaint to which a demurrer had been overruled. The suit was brought for an accounting and to recover franchise taxes for twenty years at the rate of 2 per cent of the annual gross receipts derived from a high power electric system maintained over twenty miles of highway in Tehama County.

In 1902 Tehama County granted to the Northern California Power Company, by ordinance number 30, a fifty-year franchise to construct and maintain on all county roads therein a system of high power electric lines free from franchise taxes or charges. It was not an exclusive franchise. In 1909 Tehama County granted another similar fifty-year franchise to

Sacramento Valley Power Company, under the Broughton Act, St. 1905, p. 777, by ordinance number 36, under which it constructed and operated twenty miles of high power electric lines on a certain road in that county covered by the former license. The last-mentioned franchise provides in accordance with the statute, that, after the first five years, the licensee shall pay the municipality 2 per cent of the gross annual receipts of the business. Both franchises were granted for exactly the same purpose, and cover all county "bridges and highways * * * streets, alleys and avenues of the various unincorporated towns and villages in said Tehama County". In January, 1911, before the expiration of five years from the execution of the last-mentioned franchise, all of the properties of the Sacramento Valley Power Company, including the last-mentioned franchise of 1909, were transferred by deed to the Northern California Power Company. In 1919, the defendant, Pacific Gas and Electric Company, acquired title to both of said franchises and continued to operate the consolidated electric power systems without payment or demand for franchise tolls under the latter license. For twenty-two years the enterprise was conducted without any attempt to collect taxes. May 16, 1938, the plaintiff brought this suit for accounting of the gross receipts of the enterprise and for payment of the claimed franchise tolls under the 1909 license. A demurrer to the complaint was overruled and the defendant was allowed ten days in which to answer. The defendant failed to answer the complaint. Judgment by default was therefore rendered against it. From that judgment this appeal was perfected.

The appellant contends that it became the purchaser and is now the owner of both franchises granted for the identical purpose of authorizing the construction, maintenance and operation of electric power lines on all roads, streets and highways in the County of Tehama; that the first franchise empowers it to maintain and operate all such lines free of charge; that although the second franchise does provide for a tax based on gross annual income from the business, the owner of both franchises has the option to determine under which license it elects to continue the operation of the business, and that it appears the enterprise was continued under the original license.

On the contrary, the respondent asserts that the franchise of 1909 was a contract granting to The Sacramento Valley Power Company a fifty-year privilege or license to operate power lines along the public roads of Tehama County in consideration of the payment of 2 per cent of its gross annual receipts therefrom after the expiration of five years from its issuance and that the defendant may not purchase and enjoy the fruits of that contract without paying the specified franchise tolls.

[1] We are of the opinion the demurrer to the complaint should have been sustained for the reason that the complaint fails to state a cause, and because the statute of limitations bars the action. The facts alleged in the complaint clearly show that the Northern California Power Company held a prior, valid, blanket franchise, issued to it by the County of Tehama in 1902, to construct, maintain and operate for a period of fifty years a high-power electric system, including the necessary poles, wires and equipment on all the roads and highways in the county, without the payment therefor of franchise tax or tolls. It actually constructed and operated many miles of electric system over the highways of that county. December 7, 1909, the board of supervisors of Tehama County granted a similar fifty-year franchise to the Sacramento Valley Power Company, covering the same roads, streets and highways, and for precisely the same purpose for which the 1902 franchise was granted. This latter franchise, however, provided that, in accordance with the Broughton Act, after five years from the date of the franchise the licensee should pay to the County of Tehama 2 per cent of the gross annual receipts received from its enterprise. The Sacramento Valley Power Company constructed and operated under its franchise twenty miles of high-power electric poles and wires along a particular highway in Tehama County. Before the five years had elapsed during which the last-mentioned company was exempt from payment of franchise tax, and on February 1, 1912, all of its equipment and franchise were purchased and transferred by deed to the Northern California Power Company which did not replace the poles and wires, but continued to operate said twenty miles of electric lines in conjunction with its other high-power system in that county. October 3, 1919, all of said electric system, together with the properties of every na-

ture incident thereto and the two franchises were acquired and transferred to the defendant, which consolidated the entire system and continued to operate under one system. No franchise tax or tolls were ever paid upon the twenty-mile system or at all. Many other miles of poles and wires were subsequently added to its system in Tehama County under the 1902 franchise. It is alleged that all of the defendant's high-power system was "used and operated * * * under the said Sacramento Valley Power Company franchise". But this is apparently incorrect as the complaint clearly alleges that most of the system was previously constructed and operated under the 1902 franchise. Moreover, the complaint subsequently alleges that the defendant claims to have consolidated the properties of the Sacramento Valley Power Company with its general system, and to have operated its entire system at all times under the 1902 franchise and not under the subsequent one. It is true the complaint alleges that 2 per cent of the gross annual receipts of the enterprise has not been paid, and that defendant, "though often requested, has refused to pay the whole or any part thereof". It is not alleged, however, when such requests were made. Under the well-established rule that upon demurrer the allegations of the complaint must be construed most strongly against the pleader, we must assume the requests were not made until just before the commencement of this action. The failure to demand tolls under the 1909 franchise for a period of more than twenty years furnishes the inference that both parties assumed the electric power business was being operated under the prior franchise of 1902 and that the taxes were therefore not due or payable. If the respondent's theory were true, the first instalment of tolls would have been due and payable December 12, 1914. Yet no action was taken by the plaintiff to recover those taxes until this suit was commenced in 1938.

[2] By the purchase and acquiring of the properties of the Sacramento Valley Power Company by the Northern California Power Company, the latter corporation acquired nothing it did not previously possess except the bare poles, wires and equipment of the twenty-mile line. It gained no new privileges under the last franchise. The grantee already owned the blanket franchise to construct, maintain and operate electric power poles, wires and equipment on all the roads and highways of Tehama County, including the one upon which the twenty-mile system had been erected. The defendant was authorized to pull up the poles and dismantle the wires on that acquired twenty-mile line and replace them with poles and equipment of its own construction without incurring a liability to pay the franchise tolls provided for in the latter franchise. That would furnish conclusive evidence of an intent to abondon the last franchise. It would, however, be an absurd, idle and unjust rule that would require such useless destruction of property merely to avoid the taxes incident to a franchise under which the owner did not propose to operate its business. The law does not require the idle act of destroying property merely to replace like property to be used for the same purpose. Sec. 3532, Civ.Code.

[3-5] The only question upon this appeal is whether the 1909 franchise was abandoned and the electric power system in Tehama County thereafter operated under the prior, valid franchise of 1902, which was issued for the identical purpose. There is no question that, so long as a public service is not discontinued, a franchise may be either lost or abandoned by subsequent conduct. The supplying of electric power in Tehama County was never discontinued on any of the lines belonging to the defendant. The question of the abandonment of a franchise must be determined from the intention of the parties ascertained from their declarations and conduct. The conduct of the defendant in neglecting to demand the taxes for a period of more than twenty years indicates its intention to consent to defendant's abandonment of the last franchise. Its failure and refusal to pay tolls and its continuation to operate the entire system with full authority to do so under the prior franchise indicates its intention to abandon the last license.

In 26 Corpus Juris 1042, section 110, it is said with respect to the termination of a franchise: "A franchise may be lost by subsequent abandonment after it has been exercised. The abandonment of a franchise is a question of intention. Nonuser is a fact in determining it. The disposal of property necessary for use in the exercise of a franchise will tend strongly to show the abandonment of such franchises."

In the present case the very statute under which the 1909 franchise was created specifically provides that it shall be forfeited by failure to pay the franchise tax. The act provides in that regard. St. 1905, p. 778: "No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited." Section 3.

For twenty-two years no franchise tax was paid or demanded by the County of Tehama. Since the defendant owned the prior valid franchise to operate the electric system on all roads and highways of Tehama County the purchase of the Sacramento Valley Power Company's equipment certainly authorized it to maintain that line under its former blanket franchise without the payment of taxes or percentages of the gross annual income therefrom. The complaint indicates that is exactly what the defendant proceeded to do. To have deliberately waived its right to do so, and to have elected to operate under the 1909 franchise at the unnecessary cost of franchise tolls would be contrary to common sense, good business judgment and the purport of the very allegations of the complaint. The situation is similar to the owner of land who grants A an easement to travel over a particular roadway with any conveyance he elects to use for fifty years without paying for the privilege. The owner subsequently grants B a similar easement to travel the same road with an automobile for fifty years in consideration of $10 per year. A purchases B's easement and automobile, and proceeds to drive it over the same road. May the owner of the land thereafter collect from A $10 per year for driving his purchased automobile over the same road for which he held a prior, valid easement without pay, merely because he bought B's easement and automobile? We think not. A acquired no new benefits so far as the easement is concerned, which he did not previously enjoy. He had a right to continue to travel the right of way in any conveyance under his prior easement. It seems to us the same principle applies to the present case.

The respondent relies on article XII, section 10, of the California Constitution, which provides: "The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges."

[6] The foregoing provision has no application to the question which is involved on this appeal. The legislature has not attempted to pass a law exempting a lessor or lessee, a grantor or a grantee from liability incurred on account of the operation, use, enjoyment or privileges conferred or contracted in the construction, maintenance or operation of any electric power system in Tehama County or elsewhere.

[7–9] This section does not prohibit the sale or transfer of a franchise. City of South Pasadena v. Pasadena Land & Water Company, 152 Cal. 579, 93 P. 490. Nor does it prevent the abandonment of a franchise, except where a public service is discontinued or when the enterprise affected thereby is relieved of obligations or liabilities previously incurred in the operation of the industry. It establishes no obstacle to acquiring a franchise and abandoning it so as to continue the service of the business under a former valid franchise which covers all benefits and privileges secured thereby. The case of Oakland v. Great Western Power Co., 186 Cal. 570, 200 P. 395, upon which both parties to this action rely, appears to have determined that very point. It holds that the acquiescence of a later franchise for the same purpose covered by a former one does not have the effect of terminating the prior license; that a later franchise granting the same privileges conferred by a former one, although accepted from the state, need not be used, and when it is not exercised the conditional tolls provided for therein are not due or payable, and that the power lines constructed under one franchise may be operated and used under another license. That is in accordance with common sense and justice and the exact letter of the contract. The case of County of Inyo v. Hess, 53 Cal.App. 415, 200 P. 373, 377, upon which both parties to this action also rely, appears to support the defendant's contention that the mere fact that it purchased the 1902 franchise in no way precludes it from abandoning that license and proceeding to operate and maintain its entire electric system under its former, blanket franchise of 1902. In the Hess case Inyo county sought to collect 2 per cent gross annual income from a telephone system formerly constructed by Hess under a franchise issued to him by the county pursuant to the Broughton Act which provides for the payment of such taxes just as is contended in the present case. Hess' franchise was assigned to the Inyo Telephone Company which continued to operate the acquired system pursuant to the provisions of section 536 of the Civil Code. It was contended that the taxes imposed by the original franchise under the Broughton Act obligated the assignee to pay tolls as therein provided. The trial court so held and rendered judgment for the plaintiff. On appeal that judgment was reversed. The Supreme Court held: "As we have seen, the right of the corporations to use the highways existed independently of the Hess franchise, and under the assignment thereof *they took nothing other than what they already had, namely, the right to occupy the highways with poles and lines of wire constructed by them. This right, in our opinion, implies the right to use the highways for the lines constructed by Hess, and which they acquired by purchase.* * * * The operation of the lines by the corporations was not under the Hess franchise, but under an existing and superior right granted the corporations by section 536. As operated by the corporations, there was no gross revenue arising from the use, operation, and possession of the Hess franchise. Their right to use the highways in operating such lines was not impaired by the fact that Hess, by a naked assignment, transferred the franchise to them."

The Hess case is merely the converse of the present case in one respect, but the principle involved in both cases is the same. In the Hess case the original franchise under the Broughton Act called for the payment of tolls based on the gross annual income from the enterprise. In the present case the business was continued under the prior valid, existing franchise of 1902, which required the payment of no tolls.

[10] Moreover, this action is barred by the statute of limitations. Sec. 345, Code Civ.Proc.; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370. A county may not wait for twenty-two years to demand or recover franchise taxes due or payable under the Broughton Act.

The complaint fails to state a cause of action, and the alleged cause is barred by the statute of limitations. The demurrer should have been sustained.

The judgment is reversed and the trial court is directed to render judgment for the defendant.

We concur: PULLEN, P. J.; TUTTLE, J.

---

33 Cal.App.2d 453

## HARADA v. FITZPATRICK et al.

Civ. 2335.

District Court of Appeal, Fourth District, California.

June 21, 1939.

Hearing Denied Aug. 18, 1939.

**1. Divorce 🔑164**

Evidence sustained judgment vacating an order which modified an interlocutory decree of divorce on finding that the order was obtained by "extrinsic fraud," in that material facts were withheld from the trial judge pursuant to a conspiracy to defraud plaintiff who had leased land involved in the interlocutory decree.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words & Phrases.]

**2. Judgment 🔑443(1)**

A judgment obtained by extrinsic fraud may be set aside and annulled by a court of equity.

**3. Judgment 🔑452**

A person who is adversely affected by a judgment obtained by extrinsic fraud and who was not a party to the action in which the extrinsic fraud was perpetrated may bring an action in equity to vacate it.

---

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by M. Harada against John A. Fitzpatrick, Verna N. Fitzpatrick and James F. Fitzpatrick to cancel and annul an order modifying an interlocutory divorce decree and to enjoin further proceedings in a justice court. From judgment for plaintiff, defendants John A. Fitzpatrick and James F. Fitzpatrick appeal.

Affirmed.

Wilmer Breeden, of San Diego, for appellants.

Rorick & Cottingham, of Oceanside, and Wright, Monroe & Harden, of San Diego, for respondent.

MARKS, Justice.

This is an appeal by John A. and James F. Fitzpatrick from a judgment vacating an order which modified an interlocutory decree of divorce on the ground that the order was obtained by extrinsic fraud. (Sometimes in the record James F. is called James V. Fitzpatrick.) Defendant Verna N. Fitzpatrick, who was the defendant in the divorce action, has not appealed.

John A. Fitzpatrick and Verna N. Fitzpatrick were husband and wife. James F. Fitzpatrick is their son. They had another son and two daughters.

Mr. and Mrs. Fitzpatrick owned thirty-five acres of farming land near Oceanside, in San Diego County. Title to seventeen acres stood in their names as joint tenants. Title to the other eighteen acres, which was community property, stood in the name of John A. Fitzpatrick.

On September 17, 1932, John A. Fitzpatrick filed a complaint for divorce on the grounds of desertion and extreme cruelty. The complaint alleged the ownership of the thirty-five acres of land and that "by agreement between the parties to this suit, the defendant is to have possession of said real estate, and is to have the care, custody, control and support of said children."

On October 13, 1932, Mrs. Fitzpatrick made default and John was granted an interlocutory decree of divorce. The court found all the allegations of the complaint to be true. The interlocutory decree did not attempt to dispose of the title to the community property. It did provide:

"That the defendant have the possession and rents and profits of and from the 35-acre tract mentioned in the complaint, together with the household furniture, fixtures and equipment on said real estate, and that she shall have the care, custody and control of James F. Fitzpatrick, Dorothy Fitzpatrick, William Fitzpatrick and Margaret Fitzpatrick, children of the plaintiff and defendant; all to the further order of the court."

On August 31, 1933, Verna N. Fitzpatrick, as lessor, leased the thirty-five acres, less one and one-half acres and the buildings thereon, to M. Harada for fifteen years, from December 1, 1933, to December 1, 1948, at an annual rental of $400 for the first six years, and at an annual rental of not less than $300 nor more than $500 for the balance of the term, the amount to be agreed upon by the parties or fixed by arbitration.

The lease recited that Mrs. Fitzpatrick had the right of possession of the land under the interlocutory decree of divorce; that about one-half of the land was the joint tenancy property of Mr. and Mrs. Fitzpatrick and that title to the balance stood in the name of John A. Fitzpatrick but was claimed by the lessor to be community property.

The lease provided that in case Mrs. Fitzpatrick lost the right of possession of the land, the lease should be terminated without any cause of action arising against the lessor.

Mrs. Harada went into possession of the leased premises and up to December 1, 1936, expended over $15,000 in improving it. She planted it to asparagus, which, by December 1, 1936, had sufficiently developed to give promise of being a very profitable crop. The evidence shows that it takes three or four years to develop asparagus to the point of being profitable; that during the fourth or fifth year of the life of the plants they should for the first time produce sufficiently to show a profit; that they will continue to so produce for about ten years.

From December 1, 1933, to December 1, 1935, the rent was paid to Mrs. Fitzpatrick. She gave one-tenth of it to her church and used the balance for the payment of back taxes and for living expenses of herself and her children. During the latter part of that period James F. Fitzpatrick demanded that the rent be paid to him as he objected to the tithe being paid to the church. He threatened to have his mother committed to a psychopathic ward and under this threat she permitted him to collect the rent for about one year. Prior to December 1, 1936, Mrs. Fitzpatrick informed James that she was going to return to the old method of collecting the rent herself and of paying the tithe to the church. James requested Mrs. Harada to withhold the payment of rent due on December 1, 1936, informing her that there was a dispute as to whom it should be paid.

John A. Fitzpatrick had been living near Fresno, California, for several years prior to December 1, 1936. He had visited his family about twice each year and knew of the lease, the improvements put upon the land by Mrs. Harada, the condition of the asparagus and the prospects of its becoming a profitable crop.

James went to see his father and discussed the modification of the interlocutory decree of divorce to the end that John, instead of Verna, would be given possession of the land and the lease with Mrs. Harada terminated. A few days later John came to San Diego and with his son went to the office of an attorney and consulted with him on this matter. James took the lease from the possession of his mother and exhibited it to this attorney who had also read the interlocutory decree of divorce. They were advised that if this decree were modified so that possession of the leased land would be taken away from Verna and given to John the lease would be terminated automatically.

An affidavit was prepared on December 8, 1936, and an order was issued on the same day requiring Mrs. Fitzpatrick, on December 14, 1936, to show cause why the interlocutory decree should not be modified. A copy of the affidavit and order to show cause were served on Mrs. Fitzpatrick by her son James on December 8, 1936. She did not appear at the hearing, either in person or by counsel, and the decree was modified, taking the possession of the land away from her and giving to John the "possession and control and the rents and profits" of the leased land. He was ordered to pay Mrs. Fitzpatrick $20 per month for the support of their minor daughter Margaret. He admitted during the trial of this action which started on November 16, 1937, that he had paid nothing under this order.

In the affidavit of John A. Fitzpatrick it is stated that Mrs. Fitzpatrick "became irrational and nervous and unable to properly take care of the property and the rent and income from the same and to properly transact business and to realize the nature and effects of her acts; * * * that defendant is now in what affiant regards as a mildly psychopathic condition, that she suffers from hallucinations, and hysteria, hears voices, and speaks in what she calls tongues which is nothing but the utterance of mysterious and imaginary words from no human language." The attorney who prepared and filed this affidavit and represented John on the hearing of the order to show cause did not ask for the appointment of a guardian ad litem for Mrs. Fitzpatrick. These averments, if true, may explain why she did not appear to resist the move to modify the interlocutory decree. We must assume that John believed them to be true because he swore to the truth of the affidavit. They furnish ample ground for the conclusion that John A. Fitzpatrick believed, that because of her mental condition, Mrs. Fitzpatrick would not understand the nature or purpose of the proceeding and would not resist it; that the decree would be modified at an ex parte hearing without has having to disclose his purpose or the real situation that existed; that thereby his scheme of dispossessing Mrs. Harada could be consummated easily. On January 7, 1937, a final decree of divorce was rendered.

On December 31, 1936, John A. Fitzpatrick served on Mrs. Harada written notice of the modification of the decree; that her lease was ended and terminated; that all the future arrangements in regard to the leased property should be made with him. On February 1, 1937, he served on Mrs. Harada a demand for possession of the property. In March, 1937, he filed an unlawful detainer action in the justice's court of Oceanside Township. Immediately thereafter plaintiff instituted this action to cancel and annul the order modifying the interlocutory decree of divorce and to enjoin further proceedings in the justice's court.

Before passing from the statement of facts it should be observed that Mrs. Fitzpatrick defaulted in this action; that she did not obey a subpoena served on her requiring her presence as a witness for plaintiff; that she was brought into court on a bench warrant; that she testified that she knew it was the purpose of John A. and James F. Fitzpatrick in seeking a modification of the interlocutory decree of divorce to defraud plaintiff out of her lease and investment. The trial court on ample evidence found that she knew that the proceeding to modify the decree "was to be made for the purpose of defeating the rights of the plaintiff in and to said lease and destroying plaintiff's lease on said premises, and of obtaining possession of the crop. * * *"

The trial court found all facts in favor of plaintiff; that John A. and James F. Fitzpatrick had conspired together to secure modification of the interlocutory decree for the purpose of defrauding plaintiff out of her leasehold interest; that Mrs. Fitzpatrick, while not an active conspirator, had knowledge of the conspiracy and its purposes and did not resist the move to modify the decree; that the fact of plaintiff's lease and the investment by her of a large sum of money on the leasehold, and the terms of the lease providing for the forfeiture of plaintiff's leasehold estate in the event Mrs. Fitzpatrick lost possession of the property through modification of the interlocutory decree, were concealed from the trial judge who signed the order modifying the decree; that had these facts been disclosed to the trial judge he would not have modified the decree.

Appellants urge that plaintiff was given notice of the move to modify the decree; that as she then had the opportunity to protect her rights, and failed to do so, she should not be heard to complain now. This argument is based on the following writing given to plaintiff:

"Dec. 9, 1936.

"The rent was withheld till farther orders of the court, and no fault of the rentee.

"Mrs. Verna Fitzpatrick."

Plaintiff had attempted to pay her rent due on December 1, 1936, which payment was not accepted. The writing was given for the sole purpose of showing she was not in default under the terms of the lease. No other construction should be placed upon it. It did not inform her of appellants' move to have the decree modified.

We will not consider the many contentions made by appellants as we regard them unnecessary to our decision. A discussion of them would merely result in burdening this opinion with consideration of technical questions which cannot affect the result here.

[1] It cannot be doubted that there is ample evidence in the record (including direct admissions of both appellants while on the witness stand) which support the findings that John A. and James F. Fitzpatrick entered into a conspiracy to defraud plaintiff, and that Mrs. Fitzpatrick gave her tacit consent to the conspiracy and its purpose, which was known to her, by her failure to inform plaintiff of what was being done; that in consummating this conspiracy appellants concealed from the trial judge the very material facts of the lease and the large investment of plaintiff in the leased premises together with the further facts that her lease would be terminated automatically; that she would be ousted and her investment would be lost should the decree be modified as contemplated. This constituted extrinsic fraud on the trial court. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184.

[2] A judgment obtained by extrinsic fraud may be set aside and annulled by a court of equity. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; Follette v. Pac. Light & Power Corp., 189 Cal. 193, 208 P. 295, 23 A.L.R. 965; Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Herd v. Touhy, 133 Cal. 55, 65 P. 139.

[3] A person, not a party to the action in which the extrinsic fraud is perpetrated, who is adversely affected by the judgment, may bring an action in equity to vacate it. Bowman v. Bowman, 97 Cal.App. 613, 275 P. 1023; Associated Oil Co. v. Mullin, 110 Cal.App. 385, 294 P. 421; Estate of Ince, 98 Cal.App. 763, 277 P. 886; Baar v. Smith, 97 Cal.App. 398, 275 P. 861.

The judgment is affirmed.

I concur: BARNARD, P. J.

KEY NUMBER SYSTEM

## In re KEET'S ESTATE. *

## FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. REED et al.

Civ. 12169–S.

District Court of Appeal, Second District, Division 1, California.

June 21, 1939.

Rehearing Denied July 17, 1939.

Hearing Granted Aug. 18, 1939.

**1. Executors and administrators** 🔑315(6)

The trustee of a testamentary trust derives his authority as such solely from the decree of distribution, which is the judicial construction of the will.

**2. Executors and administrators** 🔑315(6)

Where testamentary trustee does not appeal from decree of distribution, it becomes conclusive upon trustee, who can no longer contend for a construction differing from that imported by its terms.

---

*For subsequent opinion see 100 P.2d 1045.

**3. Executors and administrators ⚷315(6)**

A decree of distribution must be regarded as a construction by the court of testator's intention, and must be treated as if testator had created the trust in the terms of the decree.

**4. Executors and administrators ⚷315(6)**

A decree of distribution becomes the measure of the rights of all claimants to the estate.

**5. Executors and administrators ⚷315(5)**

A decree of distribution, following terminology of will, authorizing trustee to lease, sell and invest in other securities "such part of said trust property as shall not be required for the immediate needs of this trust, as hereinafter provided," and directing trustee to "set apart as a separate and special fund" specified stock, required trustee to hold the stock intact in a special fund, and made trustee liable for loss incurred by selling such stock and reinvesting proceeds.

**6. Trusts ⚷191(1)**

The specific mention of certain property in will or other instruments declaring trust, particularly where such property comprises the whole of the trust property, indicates intention that the property should not be sold but should be retained in specie, even though the property is unproductive.

**7. Trusts ⚷177**

The statute authorizing Superior Court to retain jurisdiction when testamentary trust continues after distribution, to determine to whom property shall pass, to the extent that such determination is not concluded by the decree of distribution, and to give trustee instructions, gives the probate court special statutory jurisdiction, not part of the general jurisdiction to administer estates, but corresponding to the equity jurisdiction over trusts. Probate Code, § 1120.

**8. Trusts ⚷177**

The statute authorizing Superior Court to retain jurisdiction after testamentary trust continues after distribution, to determine to whom property shall pass to the extent that certain determination is not concluded by the decree of distribution, and to give trustee instructions, does not add to the general administrative law of trusts, and nothing beyond the jurisdiction thus granted may be exercised by the court in probate. Probate Code, § 1120.

**9. Trusts ⚷178**

The probate court has statutory jurisdiction of petition by trustee for instructions concerning the administration of his trust after decree of distribution, making it unnecessary to invoke the aid of equity court in determination of controversies between trustees and beneficiaries coming within the purview of the statute. Probate Code, § 1120.

**10. Trusts ⚷178**

Where testamentary trustee filed petition entitled "petition for instructions, for authority to sell stock and for authority to invest proceeds," but merely alleged that sale was for best interests of the estate and sought authorization of sale without alleging any doubt concerning trustee's power under the will to sell, order authorizing the sale was not a determination that trustee had the power to sell, and hence did not preclude recovery from trustee for loss caused by unauthorized sale.

**11. Trusts ⚷193½**

A trustee may sell the trust property with court's permission if, owing to circumstances not anticipated by or known to settlor, purpose of the trust will be defeated or substantially impaired unless property is sold, even though trust does not authorize trustee to sell or even directs him not to sell.

**12. Trusts ⚷193½**

The mere fact that a sale of trust property would be advantageous to beneficiaries is not of itself a sufficient ground for permitting it, where the trust does not empower trustee to sell or direct him not to sell.

**13. Wills ⚷178, 194**

Where trustee, in petition for instructions and for authority to sell trust property, did not allege sufficient facts to give the probate court jurisdiction by alleging doubt concerning its power under the will to sell, order authorizing sale was void so far as it conflicted with decree of distribution indicating that trustee had no authority to sell, and hence could be attacked either directly or collaterally by parties or stranger. Probate Code, § 1120.

**14. Judgment ⚷577(1)**

A judgment void on its face is not a bar to an action subsequently commenced, and the rule of res judicata does not apply thereto.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding in the matter of the estate of Walter S. Keet, deceased, wherein the Farmers & Merchants National Bank of Los Angeles, as trustee of the trust created under the last will and testament of Walter S. Keet, deceased, filed account current and report of administration, to which Georgia Keet Young Reed and another filed objections. From a judgment and order sustaining objections and disallowing portions of the account, the petitioner appeals.

Affirmed.

Chenoweth & Whitehead, Morton L. Barker, and Lawler, Felix & Hall, all of Los Angeles, for appellant.

Howard & Littlefield, of Hollywood, for respondents.

YORK, Presiding Justice.

Appellant, as trustee under the last will and testament of Walter S. Keet, deceased, prosecutes this appeal from a judgment and order sustaining objections to and disallowing certain portions of its eighth account current and report of the administration of said trust estate. Written objections to said account were filed by respondent widow, who is the life beneficiary of a certain trust created by said will.

The facts which form the basis of the appeal may be summarized as follows:

Walter S. Keet died testate August 13, 1926, and his last will was admitted to probate on September 13, 1926. The decree of distribution therein was made and entered on November 14, 1927, carrying out the terms of the said last will, and after providing for the distribution of certain bequests, sets up *first* a general trust composed of "all the rest, residue and remainder of said estate". The decree *next* creates a separate trust in favor of Mrs. Emma Hubbard for her lifetime in certain securities, with power in the trustee to convert the same, and upon her death such securities to "become a part of the general trust fund". The decree of distribution *then* proceeds to carve out and set apart from said general trust fund a separate trust estate as to all common stock owned by decedent in the United Steel & Wire Company of Battle Creek, Michigan, in the following language:

"Said trustee shall set apart as a separate and special fund all common stock belonging to decedent in the United Steel & Wire Company of Battle Creek, Michigan, and shall pay to said Georgia S. Keet, widow, the net income derived therefrom during her natural lifetime—and shall pay to said widow all dividends accruing upon said stock from the date of death of the decedent herein; and upon the death of said widow, this separate and special trust fund shall become a part of the general trust fund of said estate."

On March 7, 1928, appellant bank, which was named an alternative trustee in the will, was appointed trustee in the place and stead of Leslie E. Clawson, resigned trustee. Appellant since the date of its appointment as such trustee has handled the various trusts in separate accounts, designating the general or residuary trust as C-788; the trust in favor of Mrs. Hubbard as C-788-B, and the special trust for the benefit of the widow as C-788-A. It is mainly with reference to this last-named trust that this appeal is concerned.

When it accepted the trust, appellant received from the resigned trustee 3240 shares of the common stock of the United Steel & Wire Company which constituted the entire corpus of said special trust C-788-A. These shares were then appraised at $24,300 and that value was set up on the books of the trustee during the year 1928. In 1928, subsequent to the appointment of appellant as trustee, the steel company issued two shares of stock for each share of common stock then outstanding, and appellant thereafter held 6480 shares of said stock as trustee of the special trust estate C-788-A. The said steel company of which decedent Walter S. Keet was one of the founders, is a Michigan corporation engaged in the manufacture of various light steel and wire products, including refrigerator racks, household appliances, steel shelves, bird cages and bathroom fixtures, steel hoops and wires for steel brackets for miscellaneous use, parts for trailers, etc. It appears from the record that said company, through increased volume of business, earned in the year 1935 an increase in profits over the previous year in the sum of $50,000, and in May, 1937, again issued two shares of common stock for each share thereof then outstanding.

From March 7, 1928, until May 5, 1936, appellant administered said trust C-788-A and paid out the income therefrom to the respondent widow. On the latter date, however, appellant petitioned the probate court pursuant to section 1120 of the Probate Code "for instructions, for authority to sell stock and for authority to invest proceeds from sale of stock", alleging that "your petitioner * * * holds as part of the assets of said estate 6,480 shares of common stock of United Steel & Wire Company carried at $24,300; that after careful investigation made by your petitioner, your petitioner has concluded that it is for the best interests of said estate and in order to bring about a more extensive diversification in the assets held by your petitioner, to sell approximately one-half or 3,240 shares of said common stock" at the current market price on the date of sale of not less than $7.50 per share. Pursuant to said petition, the court duly made its order on May 22, 1936, authorizing the sale of 3,240 shares of said stock and the investment of the proceeds therefrom in municipal bonds. In accordance with said order, appellant on June 1, 1936, sold 1000 shares of said stock at $9.75 per share; on August 13, 1936, 1000 shares at $14 per share, and on August 22, 1936, another 1000 shares at $14⅜ per share, and with the proceeds of such sales, purchased municipal bonds of the par value of $32,000, paying therefor the sum of $37,968.90, or a premium of $5,968.90. The eighth account current of appellant shows that approximately 20 per cent of the coupon interest received by trustee on said bonds was allocated to the principal for amortization of said premium.

On April 6, 1937, appellant trustee filed its eighth account current covering the period from March 8, 1936, to March 8, 1937. Said account was a report and accounting of the entire trust estate, both general and special, to-wit: Trusts C-788, C-788-A and C-788-B. With respect to C-788-A, appellant recited, among other things, the sale of 3000 shares of the common stock of United Steel & Wire Company and the purchase of municipal bonds with the proceeds from such sale; prayed for an allowance of $85 as attorneys' fees, $50 in connection with an opinion rendered by its attorneys on the propriety of the sale of said stock, and $35 for preparation of the eighth account current; and also prayed for trustee's fees in the sum of $636.30 for services rendered in administering said trust C-788-A for the period covered by the said account.

On April 27, 1937, respondent filed her objections to said account, alleging a loss of $3,050 in income by reason of said sale of stock, and upon the issues joined by appellant's answer thereto, the court rendered its order and decree in favor of respondent widow.

At the commencement of the trial it was stipulated that respondent Salvation Army should be deemed to have joined in the objections filed by respondent widow.

During the trial it was stipulated, among other things, that if the 3000 shares of steel company stock had not been sold, appellant would have received an additional $2,450 as dividends on said stock during the period covered by the eighth account current. It was further stipulated that the net yield on the bonds purchased with the proceeds of the sale of stock during the accounting period was approximately $424, and that the difference between the income received and that which would have been received had the 3000 shares of stock not been sold was $2,034.

On November 16, 1937, the court made its findings of fact wherein it found, among others, that appellant sold the 3000 shares of stock without authority to do so; that appellant had no power to reinvest in the bonds purchased by it from the proceeds of the sale of said stock; and that appellant was chargeable, as of the date of filing of the eighth account current, with 6480 shares (12,960 shares of the new issue as per the split of May, 1937) of common stock of United Steel & Wire Company, at a market value of $129,600.

The court then made its conclusions of law, the same being in part as follows:

"I. That the object of the testator, as shown by the provisions of the said decree of distribution * * * was to set aside a fund for his said wife, Georgia S. Keet, that should be kept intact and unsold, the net proceeds of which should be paid to his wife; that it was the will and intention of the testator that the common stock belonging to him in the United Steel & Wire Company, as shown from the trust provisions in the decree of distribution, should not be sold by the trustee for the sake of diversifying the stock, or at all, and that it should be at all times during the life of Georgia S. Keet held as a separate and special trust fund. That under the provisions of said decree of distribution, dated the 14th day of November, 1927, the trustee had no power to sell or otherwise dispose of the said common stock in the United Steel & Wire Company of Battle Creek, Michigan, * * * comprising the principal of said trust designated as Trust No. C-788-A.

"II. That the decree of distribution in the above entitled estate dated November 14, 1927, has become final and is the sole decree of distribution in said estate and ever since the rendition thereof has been and still is in full force and effect; that said decree of distribution is res judicata as to the terms and provisions of said trust (known and designated as Trust C-788-A at the Farmers & Merchants National Bank of Los Angeles), and is res judicata as to the powers and duties of said trustee. * * *

"IV. That the petition * * * filed by the trustee did not ask for a construction by the court as to whether under the decree of distribution of November 14, 1927, the trustee had the power to sell any portion of the corpus of Trust C-788-A, to-wit: any portion of the said 6480 shares of stock * * * and that the said court by its order of May 22nd, 1936 * * * did not determine, or attempt to determine the powers of the trustee. That said order of May 22, 1936, is not res judicata as to the powers of the trustee under Trust C-788-A.

"V. That the above entitled court sitting in probate had no jurisdiction to vary or change the terms and conditions of the decree of distribution of November 14, 1927, and the order of the above entitled court of May 22, 1936 * * * wherein it is in conflict with the terms of the decree of distribution of November 14, 1927, is void and of no force and effect. * * *"

Thereafter, the probate court made its order and decree disallowing the eighth account current in so far as it related to the sale of said 3000 shares of stock and the purchase of municipal bonds with the proceeds of said sale, and adjudged and decreed that appellant was chargeable with the principal of Trust C-788-A as of March 8, 1937, of 6480 shares (12,960 shares—new issue) of common stock of United Steel & Wire Company at a market price as of March 8, 1937, of $129,600; adjudged and decreed that there was a balance of income due and payable to respondent by appellant trustee for the period of March 8, 1936, to March 8, 1937, in the sum of $2,004.32; adjudged and decreed that appellant file a correct and accurate report for the period in question showing a full, true and correct account in accordance with the findings of fact and conclusions of law, and the order and decree of said court. Said decree and order allowed appellant's fees as trustee in the sum of $636 for its services from March 8, 1936, to March 8, 1937, $50 thereof to be paid from the income and $586 from the principal of said trust estate C-788-A; disallowed appellant's request for attorneys' fees in the sum of $50 for services rendered in connection with the sale of 3000 shares of said stock, and adjudged the said eighth account current to be correct in so far as it related to residuary trust C-788 and the Hubbard trust C-788-B.

Appellant trustee urges as its main point upon this appeal that the order of May 22, 1936, is not subject to collateral attack and is res judicata as to the issues raised by respondent's objections to the eighth account current, arguing that the probate court adjudicated the power of the trustee to sell the stock when it made said order of May 22, 1936, and therefore it is a bar to respondent widow's objections.

In order to prevail in this appeal, it is incumbent upon appellant to show authority in itself to make the sale objected to.

[1-3] It is established beyond any question that the trustee of a testamentary trust derives his authority as such solely from the decree of distribution which is the judicial construction of the will of the testator. Where no appeal is taken from such decree by the trustee, it becomes conclusive upon him and he can no longer contend for a different construction from that which is imported by its terms "which must be regarded as a construction by the court of the testator's intention, and is to be treated as if he had created the trust in the terms of the decree". Whittingham v. California Trust Co., 214 Cal. 128, at page 132, 4 P.2d 142, 144, quoting from Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145.

[4] Also, the decree of distribution becomes the measure of the rights of all claimants to the estate, and "their rights are to be determined by the terms of this decree". Whittingham v. California Trust Co., supra [214 Cal. 128, 4 P.2d 144], quoting from McKenzie v. Budd, 125 Cal. 600, 58 P. 199. See, also, Manning v. Bank of California, 216 Cal. 629, 15 P.2d 746; Gladding v. Superior Court, 7 Cal.2d 408, 60 P.2d 857, and In re Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120.

The decree of distribution herein in creating the general or residuary trust, designated by trustee as C-788, in *"all the* *rest, residue and remainder of said estate"*, gives to the trustee the right to *"hold manage, control, protect and preserve the* property of said trust, *with power to lease, sell, contract, convey and invest in bonds,* mortgages or other income-paying securities; * * * *such part of said trust property as shall not be required for the immediate needs of this trust, as hereinafter provided;* also said trustee shall have the authority and power to perform such other acts, through legal process or otherwise, as in his judgment may be necessary for the best protection and interest of said estate". Said decree then provides for the payment to Mrs. Hubbard the net income fróm a promissory note and mortgage in the sum of $2,500 owned by decedent covering lands in Michigan, *"or such other security or securities into which said note and mortgage may be converted by said trustee,* during the natural lifetime of said Mrs. Emma Hubbard, and at her death, said security or securities and all accruing income therefrom shall become a part of the general trust fund in the hands of said trustee". (Said trust being designated as C-788-B by said trustee.)

Then follow the directions as to trust designated as C-788-A: *"Said trustee shall set apart as a separate and special fund all common stock belonging to decedent,* in the United States Steel & Wire Company of Battle Creek, Michigan, and shall pay to the said Georgia Keet, widow, *the net income derived therefrom during her natural lifetime,*—and shall pay to said widow all dividends accruing upon said stock from the date of death of decedent herein; and *upon the death of said widow this separate and special trust fund shall become a part of the general trust fund of said estate."*

Directions are then given as to the collection and accumulation of *"the income from the remainder of said trust fund and from said special and separate fund* referred to in the last preceding paragraph *after the death of said widow"*, until such time as in the discretion of the trustee the adopted daughter of decedent and her daughter shall require financial aid, whereupon the trustee shall pay the income derived from one-half of said trust fund to each respectively for life and the entire income therefrom to the survivor of them for life.

Finally, "Upon the death of all of the aforesaid beneficiaries said trustee shall close this trust and shall distribute all of the remainder of said trust funds, *either general or special,* principal, interest and income remaining in his hands" to certain designated beneficiaries among which the respondent Salvation Army of Los Angeles is one. The widow is not named a beneficiary under the general or residuary trust. (Italics added.)

[5] An analysis of the terms of the decree of distribution, the phraseology of which strictly follows the provisions of the last will of testator, reveals that the trustee is given power to sell and otherwise manage and control the property forming the corpus of the general or residuary trust, as well as the power to convert the securities of the trust in favor of Mrs. Emma Hubbard, but with regard to the stock which constitutes the corpus of the special and separate trust fund set up for the benefit of the widow, there is not the slightest intimation that the testator intended or that the probate court decided, when it construed the terms of the last will and made the decree of distribution, that the power to sell the stock should be given to the trustee. To the contrary, the apparent intention of the testator was that the stock should be held intact in a special fund until the death of the widow and then become a part of the general trust. This view gains strength from the phraseology of the general trust wherein certain powers, including a right to sell, are expressly given to the trustee in *"such part of said trust property as shall not be required for the immediate needs of this trust, as hereinafter provided"*. In other words, the express powers given to the trustee refer exclusively to the general or residuary trust and have no reference to the two succeeding trusts which are thereafter provided for, except that as to the corpus of the Hubbard trust the right to convert is therein specifically given.

[6] The language used throughout the decree of distribution, as well as the wording of the will, to-wit: "Said trustee shall set apart as a separate and special fund all common stock belonging to decedent * * * and shall pay to * * * the widow * * * the net income derived therefrom during her natural lifetime * * *" negatives any idea that the trustee had the power to sell the stock during the widow's lifetime, but rather indicates that the testator intended that the trustee should retain the stock under its control

during the life of the widow. "The specific mention of certain property in the will or other instrument by which the trust is declared, particularly where such property comprises the whole of the trust property, is an indication of an intention that the property should not be sold but should be retained in specie. This is true even though the particular property is unproductive." Restatement of the Law of Trusts, subd. (e), sec. 190.

Turning to the order of May 22, 1936, which is the real bone of contention here, it is argued by appellant that the terms of section 1120 of the Probate Code "invests the probate court with jurisdiction to instruct trustees of testamentary trusts in their powers and duties".

Section 1120, supra, reads in part as follows: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, *to the extent that such determination is not concluded by the decree of distribution,* of settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of his trust, * * render for settlement his accounts and report his acts as such trustee, before the superior court in which the will was probated * * *. *The trustee may also petition such court, from time to time, for instructions as to the administration of the trust.* * * *"

[7,8] "This statute (1120, Probate Code) confers on the court of probate a new jurisdiction, a special jurisdiction derived from the statute; it is not a part of the general probate jurisdiction to administer estates of decedents, but corresponds to the equity jurisdiction over trusts which, but for the statute conferring it, the court of probate would not have. (In re Estate of Hubbell, 121 Cal.App. 38 [8 P.2d 530]; Parkman v. Superior Court, 77 Cal.App. 321 [246 P. 334].) Practically a portion of the general jurisdiction over trusts has been reserved to and reposed in the court of probate. Prob. Code, secs. 1120-1127, seem to add nothing to the general administrative law of trusts, but merely to empower probate courts to do what equity always has done.) Nothing beyond the jurisdiction thus granted may be exercised by the court in probate." 11b Cal.Jur., p. 838.

Referring to the same section, the court in Re Estate of Smith, 4 Cal.App.2d 548, at page 552, 41 P.2d 565, at page 567, said: "We believe the language employed in the present section [1120] of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust. This view is strengthened by a consideration of section 1240 of the Probate Code, which provides for an appeal from an order settling an account of a trustee, *from an order instructing a trustee*", etc. (Italics added.) See, also, In re Estate of Smead, Cal.Sup., 82 P.2d 182, 183.

As pointed out in Parkman v. Superior Court, 77 Cal.App. 321, 246 P. 334, and In re Estate of Hubbell, 121 Cal.App. 38, 8 P.2d 530, except for this statute, the probate court as such would be lacking in power to determine questions thus presented to it, and the parties would be relegated to the equity arm of the superior court for the relief, if any, to which they might be entitled.

[9,10] It therefore appears that the probate court has jurisdiction with respect to those matters particularly enumerated in section 1120 of the Probate Code, including a petition by a trustee for instructions as to the administration of his trust, thus making it unnecessary to invoke the aid of a court of equity in the determination of controversies arising between trustees and beneficiaries which come within the purview of said section.

Appellant argues that in making its order of May 22, 1936, in answer to trustee's petition for instructions, the probate court decided that the trustee had the power to sell the stock involved herein. This position cannot be sustained, for the reason that the question of such power was not raised by that proceeding. In the first place, appellant trustee asked for no instructions. While its petition was entitled, "Petition for Instructions, for Authority to Sell Stock and for Authority to Invest Proceeds from Sale of Stock", it was based solely upon the allegation: "* * * after careful investigation made by your petitioner, your petitioner *has concluded that it is for the best interests of said estate and in order to bring about a more extensive diversification in the assets held by your petitioner,* to sell approximately one-half or three thousand two hundred forty (3,240) shares of said common stock of the United Steel & Wire Company; that your petitioner desires this Honorable Court to authorize and direct your petitioner to sell said three thousand two hundred forty (3,240) shares of Common stock of the United Steel & Wire Company on the open market at the current market price on the date of sale at a price not less than $7.50 a share." This was followed by an allegation regarding the investment of the proceeds of such sale, and a prayer for such authorization. If, as has been asserted by appellant, it was in doubt as to its power to sell the said stock, it would have been an easy matter to allege that fact, as well as such other facts as would have apprized the probate court sitting in equity of the necessity of a determination of that question.

[11, 12] It is now generally accepted that "although by the terms of the trust the trustee is not empowered to sell trust property, or even if he is directed not to sell it, yet if owing to circumstances not known to the settlor and not anticipated by him, the purpose of the trust would be defeated or substantially impaired, unless the property is sold, a sale can be made with the permission of the court. * * * The mere fact that a sale would be advantageous to the beneficiaries is not of itself a sufficient ground for permitting it." Restatement of the Law of Trusts, subd. (f), sec. 190. See, also, 26 Ruling Case Law, page 1288, section 139.

Under the facts disclosed by the record, the trial court herein properly found that the probate court by its order of May 22, 1936, "did not determine or attempt to determine the powers of the trustee", and for all that appears herein, the probate court might well have assumed, and no doubt did assume, from the phraseology of the petition addressed to it, that the trustee had a general power of sale with respect to the particular trust estate.

[13, 14] The trustee having failed to allege sufficient facts to give the probate court jurisdiction under section 1120 of the Probate Code, it follows that the order of May 22, 1936, wherein it is in conflict with the terms of the decree of distribution of November 14, 1927, is void on its face and of no force and effect, and consequently may be attacked either directly or collaterally by parties or strangers. Texas Co. v. Bank of America, 5 Cal.2d 35, 53 P.2d 127. A judgment void on its face is not a bar to an action subsequently commenced (Phelan v. All Persons, 202 Cal. 175, 259 P. 725), and the rule of res judicata does not apply thereto. Willis Finance & Construction Co. v. Porter, 88 Cal.App. 523, 263 P. 842.

By reason of the conclusions reached in this opinion, it is not deemed necessary to discuss other points raised by appellant.

The order and judgment sustaining objections to and disallowing certain portions of trustee's eighth account current is affirmed.

We concur: DORAN, J.; WHITE, J.

---

33 Cal.App.2d 370

## COMMERCIAL TRANSFER, Inc., et al. v. DAIGH & STEWART et al.

Civ. 6121.

District Court of Appeal, Third District, California.

June 15, 1939.

Rehearing Denied July 15, 1939.
Hearing Denied Aug. 14, 1939.

**1. Dismissal and nonsuit 🔑29**

At common law, the doctrine of retraxit was based on theory that complainant by his withdrawal had announced that he had received satisfaction for his injury and, having been satisfied, his cause of action was at an end.

**2. Dismissal and nonsuit 🔑26**

The discontinuance of action as to one of several alleged tort-feasors, no satisfaction having been received, does not release the other.

**3. Dismissal and nonsuit 🔑29**

A stipulation in open court for entry of judgment on complaint for truck owners as alleged joint feasors, and for complaining truck owner on the defending truck owners' cross-complaint, did not amount to a retraxit, releasing motorist as another alleged joint tort-feasor, in absence of actual satisfaction.

**4. Automobiles ⟹172(9)**

In action against motorist for damages arising out of collision between following and approaching trucks, motorist's negligent failure to signal sudden decrease in speed causing following truck to swing into path of approaching truck sustained recovery. Vehicle Code, § 544(c), St.1935, p. 185.

**5. Appeal and error ⟹921**

On defendant's appeal from adverse judgment, whether defendant was denied constitutional right of trial by jury would be considered in light most favorable to defendant. Code Civ.Proc. § 631, subd. 4.

**6. Jury ⟹25(6)**

A motorist being sued for damages arising out of truck collision, who was represented in court on October 6, 1937, when case was called but failed to make demand for jury until November 15th, waived right to trial by jury on December 28, 1937, when case again came on for trial. Code Civ.Proc. § 631, subd. 4.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by the Commercial Transfer, Incorporated, and another, against Daigh & Stewart, a copartnership, and others, for damages arising out of a motortruck accident wherein cross-complaint was filed by Daigh & Stewart. Judgment for plaintiffs against Willard C. Lusk, and Willard C. Lusk appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, and Andrew R. Schottky, of Merced, for appellant.

C. Ray Robinson and Willard B. Treadwell, both of Merced, for respondents.

BRUTON, Justice pro tem. delivered the opinion of the court.

This is a damage action which arose out of a motor truck accident. The trial was had before the court sitting without a jury, and from the court's judgment for plaintiff and against defendant Lusk, the defendant Lusk has appealed.

The action came on for trial on October 6, 1937, at which time a jury was present. Upon objection by counsel for defendants Daigh and Stewart the jury was dismissed, the plaintiff having demanded a jury and posted his fees less than ten days before the date set for trial. Prior to the dismissal of the jury, counsel for defendant Lusk, who had made no demand for a jury, announced he was ready for trial. Upon the dismissal of the jury a continuance of the case was had on motion of counsel for Daigh & Stewart for reasons which are not here involved.

The cause next came on for trial on December 28, 1937. However, on November 15, 1937, the defendant Lusk filed his demand for a jury and posted the necessary fees. At the time of trial, that is, December 28, 1937, the court refused defendant Lusk's demand for a jury, and the case proceeded before the court.

Upon the conclusion of plaintiff's case counsel for plaintiffs and defendants Daigh and Stewart stipulated judgment for Daigh and Stewart on plaintiff's complaint, and for plaintiff on Daigh and Stewart's cross-complaint, and further stipulated that no consideration had passed or was to be passed in satisfaction of their respective claims or otherwise. Defendant Lusk then moved the court for a nonsuit, upon the denial of which the case proceeded against Lusk, resulting in judgment for plaintiff against Lusk for the injuries complained of.

Upon the conclusion of the trial defendant Lusk moved the court for leave to amend his answer to allege the stipulated judgment in favor of Daigh and Stewart, who were charged as joint tort-feasors with Lusk. The court denied the motion for leave to amend.

The facts as disclosed by the evidence are in substance as follows: A truck and semitrailer belonging to plaintiff, Commercial Transfer Incorporated, and driven by plaintiff Garman, was traveling south at a lawful rate of speed on the Golden State highway in Merced county on March 27, 1937, at about 2 o'clock p. m., when it was passed by a car going in the same direction, driven by a Mr. Russell. After the Russell car had passed plaintiff's truck, it swung back to its right side of the highway, whereupon a car driven by defendant Lusk cut in ahead of the Commercial Transfer truck and took position between the truck and the Russell car. At this moment Russell, having given the signal for a right hand turn, proceeded to turn off the highway to the right. Lusk thereupon, without giving the signal required by law, and to avoid hitting the

Russell car, suddenly brought his car nearly to a stop. Garman, the driver of the Commercial Transfer truck, upon seeing the Lusk car suddenly decrease speed, applied his brakes. Seeing that he was about to collide with the rear of the Lusk car and in order to avoid doing so, Garman turned his truck sharply to the left, there being a bridge abutment on the right, and crossed the highway and entered an orchard on his (Garman's) left side of the highway. While this was going on, a truck belonging to the defendants Daigh and Stewart was approaching at a lawful rate of speed upon his right hand side of the highway from the opposite direction. As the Commercial Transfer truck passed across the highway and into the orchard the Daigh and Stewart truck collided with the rear portion of the Commercial Transfer semitrailer. The two trucks were partially destroyed by fire; the driver of the Daigh and Stewart truck was killed and Garman was injured.

[1-3] Appellant urges three reasons for the reversal of this cause. The first is that the plaintiff and defendant Daigh and Stewart having stipulated in open court that judgment should be entered for defendants Daigh and Stewart on plaintiff's complaint, and for plaintiff on Daigh and Stewart's cross-complaint, such stipulated judgment amounted to a retraxit which released defendant Lusk. With this contention we cannot agree. Though it is true that the defendants were charged as joint tort-feasors, it is not true that the discontinuance as to one joint tort-feasor necessarily releases the others charged with him. The rule has been broadly stated, both in this jurisdiction and in others, that the release of one joint tort-feasor is the release of all. An examination of the California cases will show, however, that this rule is predicated upon the theory that where the complainant has been compensated for his injury by one of the joint tort-feasors, a second recovery cannot be allowed. It is the fact of compensation for the wrong complained of that operates as a release of the remaining joint tort-feasors, not the mere discontinuance as to one of them without satisfaction having been given. Even at common law the doctrine of retraxit was based upon the theory that the complainant had by his withdrawal announced that he had received satisfaction for his injury, and he having been satisfied, his cause of action was at an end.

In the instant case the plaintiff stipulated that defendants Daigh and Stewart have judgment on the complaint, and both parties stipulated that no satisfaction had been given or was to be given for the injury complained of.

"The discontinuance as to one tort-feasor, of an action brought against several tort-feasors, *no satisfaction having been received,* does not release the others." Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365, 367.

To hold that, where an action is brought against several defendants alleging a joint tort-feasance as is so common in automobile accident cases, it is necessary for the plaintiff to continue to prosecute his action falso clamore against an innocent defendant after it appears from the evidence that he is not liable, in order that the guilty wrongdoer may not escape, would indeed be to sanctify form at the sacrifice of substance.

[4] The second point urged by appellant is that the evidence does not support the finding of the trial court that defendant Lusk was guilty of negligence proximately causing the accident and that plaintiff was free from negligence contributory thereto.

We will not review the evidence, but it will suffice to say that while the testimony presents the conflict of evidence that is endemic in motor vehicle accident cases there is ample evidence to support the finding of the court. Defendant Lusk's negligent failure to signal his sudden decrease in speed, sec. 544(c), Vehicle Code, St.1935, p. 185, set in motion the chain of events that resulted in tragedy as well as damage.

[5, 6] Appellant's third contention is that he was denied his constitutional right of trial by jury. On October 6th, when the cause was first called for trial, counsel for defendant Lusk appeared in court and announced that he was ready to proceed. Plaintiff had waived a jury by failing to make his demand therefor in the time prescribed by law. Defendants Daigh and Stewart made no demand for a jury. It appears that defendant Lusk had not received notice of the setting of the case for trial but knew of its having been set and consequently appeared. The day that defendant Lusk or his counsel had such actual notice of the time of trial does not appear in the record.

Considering the matter in a light most favorable to defendant Lusk and assuming that he first knew of the case having been set on the day that it was first called for trial, and relieving him from any duty to have made known his desire for a jury prior to that time, and also relieving him from the effect of having appeared and announced himself ready for trial, yet we are confronted with the fact that on October 6, 1937, counsel for defendant Lusk was in open court when this case was called and took part in the proceedings, which resulted in the setting of the cause for trial for a day certain, and at that time he made no demand for a jury. This brings him within the provisions of paragraph 4 of section 631 of the Code of Civil Procedure, which provides that a jury trial may be waived: "By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation." The request for a jury first made on November 15, 1937, was properly denied.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

---

33 Cal.App.2d 379

## In re EAKLE'S ESTATE.

## SWITZER et al. v. EAKLE.

Civ. 6243.

District Court of Appeal, Third District, California.

June 16, 1939.

Hearing Denied Aug. 14, 1939.

**1. Wills 🔑163(2)**

A beneficiary under a will who unduly profits by the will and sustains a confidential relation to testatrix and actually participates in procuring execution of will has burden of showing that will was not induced by coercion or fraud.

**2. Wills 🔑163(2)**

A presumption of undue influence arises from proof of existence of a confidential relation between testatrix and a beneficiary who sustains confidential relation to testatrix, coupled with activity on the part of the beneficiary in the preparation of the will.

**3. Wills 🔑324(3)**

Whether confidential relationship existed between 85 year old testatrix and her son who lived near testatrix and operated her ranch, and whether testatrix executed will, under which son who would have been entitled to one-third of testatrix' estate had she died intestate unduly profited, because of undue influence on part of the son was for jury.

**4. Appeal and error 🔑1002**

Determination of jury on issue on which evidence was conflicting was conclusive on appeal.

**5. Evidence 🔑89**

In the rebuttal of a presumption, it is not necessary to produce preponderating evidence, a presumption being overcome by evidence sufficient to balance it.

**6. Wills 🔑163(1)**

Generally burden of proof as to issues of fraud or undue influence is on will contestant, and the burden never shifts although where contestant establishes a prima facie case, the person charged with fraud or undue influence has burden of meeting it.

**7. Wills 🔑329(3)**

Instruction that if jury found that proponent stood in confidential relation to testatrix and participated in procurement of will, burden was on proponent to establish that will was not procured by undue influence was erroneous because placing too great a burden on proponent and because failing to state fact that proponent must have unduly profited by the will, in order to raise presumption of undue influence.

**8. Wills 🔑166(2)**

Proof of fact that testatrix and beneficiary under testatrix' will are mother and son is proof of "confidential relationship" between the parties.

[Ed. Note.—For other definitions of "Confidential Relation," see Words & Phrases.]

**9. Appeal and error 🔑1033(5)**

An instruction containing an inaccurate statement of law was not prejudicial, where only error committed was failure to state law against appellant as strongly as it might have been stated.

**10. Trial 🔑253(3)**

Instruction that presumption of undue influence arises from proof of existence of confidential relationship between testator and beneficiary coupled with activity on part of latter in preparation of will was erroneous because omitting as an element necessary to give rise to the presumption, the fact that proponent unduly profited under the will.

**11. Courts ⚷107**

Instructions which are not directly passed upon by reviewing court but which are given a "blanket endorsement" do not definitely establish the law.

**12. Wills ⚷384**

An erroneous instruction which stated that proponent was required to overcome by preponderance of evidence presumption of undue influence arising from proof of confidential relation between proponent and testatrix and of proponent's participation in procurement of will was prejudicial even though trial court gave proper instruction to effect that contestants were required to establish their case by preponderance of evidence. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Proceeding in the matter of the estate of Mary Ellen Eakle also known as Mary E. Eakle, deceased, wherein Mary Ellen Switzer and Catherine E. Eakle, as guardian of the person and estate of Stephen Smith Eakle, a minor, contested probate of the deceased's will, and William Harrison Eakle, also known as William H. Eakle, answered the contest. From an adverse judgment and from an order denying motion for new trial and an order denying motion for judgment notwithstanding verdict, William Harrison Eakle appeals.

Judgment and orders reversed.

Arthur E. Miller, Irvin C. Ford, and Wilmer W. Morse, all of Sacramento, for appellant.

A. G. Bailey, of Woodland, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from a judgment, order denying motion for new trial, and order denying a motion for judgment notwithstanding the verdict, in an action wherein the jury found for the contestant in a proceeding based upon objections to the probate of a will.

Opposition to the probate of the will was upon several grounds, including the unsoundness of mind of the testatrix, but respondents at the trial abandoned all grounds except that of undue influence. The verdict of the jury was a finding to the effect that the execution of the will was procured by undue influence upon the part of William H. Eakle, the son of the testatrix, and judgment was entered accordingly, denying probate of the will.

The testatrix, Mary Ellen Eakle, was about eighty-five years of age when the will was executed. She had come to California as a child in a "covered wagon", and had resided in Yolo county all her life. In 1913 her husband died. Surviving him were testatrix and three sons. The father left an estate of considerable size—several hundred thousand dollars. The chief asset was the Eakle ranch, which was divided in partition equally between the three children, who, in turn, paid together to their mother the sum of $50,000 in cash. In addition, the children of son William received $10,000; the contestant Mary Helen Switzer (sole child of son Henry), a like amount, and contestant Stephen, Jr. (sole child of son Stephen), a like amount. Stephen, Sr., lost his portion of the ranch by foreclosure about 1933. William lost his land in the same manner in 1936. Henry apparently had similar reverses, as the evidence shows that he was destitute and dependent upon his mother for support several years prior to his death. It also appears that about the time of the execution of the will, son William (contestee herein) was in the throes of bankruptcy. At the time of her death the testatrix was worth some $25,000.

[1, 2] It is the contention of appellant that the evidence is insufficient to support the verdict, and that the trial court therefore erred in denying a motion for judgment notwithstanding the verdict. Respondents argue that the facts bring the case clearly within the rule laid down in Re Estate of Graves, 202 Cal. 258–263, 259 P. 935, 937, where it is said: "The rule is well settled that: 'Where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud' (In re Estate of Baird, 176 Cal. 381, 384 (168 P. 561); In re Estate of Nutt, 181 Cal. 522,

528 (185 P. 393), and that 'a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will'. (In re Estate of Higgins, 156 Cal. [257], 261 (104 P. 6 [8]). In re Estate of Relph, 192 Cal. 451, 465, 221 P. 361, 367. Appellant did not sustain the burden cast upon him in the lower court, and has not satisfied us that the finding of the jury, and the consequent judgment revoking the will, are incorrect as matters of law."

This rule is further elaborated upon later in Re Estate of Leahy, 5 Cal.2d 301–304, 54 P.2d 704, 705, in the following language: "That such evidence may be sufficient to establish undue influence in the procuring of a will is confirmed by numerous decisions. Thus in an early case it was said: 'Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator.' In re Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101, 106. Again it was said: 'While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence (In re Estate of McDevitt, 95 Cal. [17], 33, 30 P. 101), such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix. (See In re Estate of Arnold, 147 Cal. 583, 589, 82 P. 252; In re Estate of Welch, 6 Cal.App. [44], 50, 91 P. 336.)' In re Estate of Snowball, 157 Cal. 301, 307, 107 P. 598, 601."

What are the circumstances in the record? At the time of the execution of the will proponent and his mother (testatrix) lived in Woodland, about 200 feet apart. Each visited frequently at the other's home. From 1930 to 1934 son Stephen, his wife and son Stephen, Jr. (one contestant), lived with testatrix, who expended several thousand dollars for his support, last illness, and funeral bills. Son Henry lived with his mother for the same period, and she supported him, paid his medical bills and funeral expenses.

Turning to the activities of contestee and proponent, and looking into the background, we find that, prior to the will, he borrowed several thousand dollars from his mother on his notes. One was paid off, and appellant "made" her destroy the other. He received money from her at other times. A servant testified that testatrix told her that proponent wanted her (the witness) "fired", as he needed the money, and witness was thereafter discharged by the mother. Testatrix told a witness that proponent did not want her to sell her ranch at Williams, because he wanted it for his children, and she said that she wanted Stevie and Helen to have a share of it. There was testimony to the effect that testatrix was weak in mind and body. In 1927 testatrix placed all her funds in the hands of witness Armfield, a Woodland attorney who had drawn the first will for her. We quote from the testimony of that witness. (The reference to "Will" is to proponent, and Henry was another son):

"A. Well, a great many times she talked to me on the proposition that Will and Henry would just abuse her and talk mean to her, until she would have to give them money and for me to pay to (no) attention to what they said, but to give her enough money, weekly or monthly, or, as she desired it, for her proper support and to refuse to give any money to the boys.

"Q. And did you obey those instructions during the time that you were the trustee? A. I did, even to the extent that, one time, I recall Will came to me with an order from Mrs. Eakle, asking me to pay Will $175.00 and I refused to give him the money. I remember another time she sent a minister to me. She had made a donation to the church of $250.00 and we refused to pay that and I talked to her about it and she said 'Oh, they made me do it.'

"Q. Did you talk to her afterwards about that $175.00 order? A. Yes.

"Q. And what did she say? A. She said that Will just kept after her and she could not refuse him and for me to go ahead as I always had done.

"Q. And you did that? A. Yes, sir, I did. The whole thing ran along very satisfactorily so far as I know, until after the death of Steve and Henry. Henry died first and then Steve, within a few months. After that time there was a constant drive, so Mrs. Eakle told me, to get the money out of my hands and put it in Mrs. Eakles own account to handle as she might please. I recall—

"Q. (Interrupting) Go ahead. A. (Continuing) I recall that Will and his wife came to my office at the bank one day and said, 'Mrs. Eakle—' this was after the death of Steve and Henry—'Mrs. Eakle wants you to place whatever balance she has, in her own separate account and give her a bank book so she can do as she pleases,' I said, 'That is all right with me, but Mrs. Eakle will have to tell me that herself.' So that night, on my way home, I stopped in to see Mrs. Eakle and told her what had occurred and she told me that I had done just exactly right and to pay no attention to what she might write or what she might do, but to keep the money and apportionate it out to her as I had done, and 'They'—she always usually spoke of the family as 'They'; that they constantly hounded her to get the money within her control and to get it out of my control."

There is testimony to the effect that proponent knew of a prior will which divided her property equally among the three sons, and that his mother was very affectionate toward him. Proponent testified that his mother trusted him. There is also evidence to the effect that proponent had charge of and worked his mother's ranch for several years prior to her death.

Coming to the execution of the will, it appears that R. L. Miller, of Oakland, California, had for some time been, and still was attorney for proponent, and had visited Woodland several times. On one of these occasions testatrix told Miller that she wanted him to draw her will "sometime". Miller testified that several days before the will was executed he wrote to proponent that he would be coming to Sacramento and would pass through Woodland the same day, and that he would draw the will for the mother if it was convenient. Asked if he had the letter or a copy thereof, he replied: "I don't know whether I have or not. When I say I think I wrote the letter, it may have been a telephone conversation with Mr. Eakle, because we had a number of telephone conversations in regard to his other business affairs, but I do recall letting him know that I was coming to Woodland." Appellant testified that he did not make the appointment, and that it may have been made by his wife. The latter was not called to testify on the point. There is no evidence that the appointment was made by, or at the request of, the testatrix. Appellant testified that he had not told his mother that the attorney would be there on that day. Referring to the manner in which the appointment with attorney Miller was made, appellant testified:

"Q. Who made the appointment? A. I did not make it.

"Q. Did you write a letter for your mother? A. No, I did not.

"Q. Did your wife write a letter for your mother? A. She might have.

"Q. Did you call him on the telephone? A. No.

"Q. Did your wife call him on the telephone? A. She might have.

"Q. Well, do you know? A. No, I do not.

"Q. Did you hear her? A. No.

"Q. You did not hear it? A. No."

In our opinion, from the evasive attitude of appellant, the jury could well have inferred that he himself was instrumental in having the entire matter concluded on that day. When Miller arrived in Woodland he went directly to the home of appellant, where he found the latter and his wife and testatrix. In the presence of all of them, Miller and testatrix talked over the terms of the will, and it was then and there written up on a portable typewriter belonging to Miller, and executed, with Miller and his friend Peters as witnesses. The latter was brought along for this express purpose.

[3, 4] We are satisfied that the evidence is sufficient to support the verdict under the rule quoted from Estate of Graves (above), and In re Estate of Baird, 176 Cal. 381, 168 P. 561. First, there is sufficient evidence of the existence of confidential relations between proponent and his mother. There are a number of facts which lead to this conclusion. Among them are: the close and intimate relationship between them; the act of the mother in turning over her ranch to the son to work; the testimony of the son that "his mother trusted him"; the testimony of witness Catherine Eakle,—"He took over his mother's affairs and she was guided by his advice";—and the relationship of mother

and son. The blood relationship alone will justify a finding that confidential relations existed (see authorities cited in discussion of instructions). In addition, there are the other facts which tend to prove the existence of the fact under discussion. It is true that the testimony of the former attorney for testatrix would tend to prove otherwise, and show that she placed her property in trust to escape the management of her affairs by her three sons. At the most, however, this raises a conflict on the issue, and the determination of the jury is therefore final on appeal. Second, appellant was active in the preparation of the will. His attorney was summoned from Oakland through no act of the testatrix, and the jury could reasonably have inferred that proponent had something to do with the presence of the attorney in Woodland when the will was drawn. The instrument was drawn at the home of appellant, and the terms thereof were discussed in his presence. The mother afterwards handed it to appellant, who retained it until her death. Third, appellant unduly profited by the terms of the will. Under the prior will in evidence, the property was divided equally between the three sons. In the event of intestacy appellant would receive but one-third of the property. Concluding our discussion of the sufficiency of the evidence, the following excerpt from Estate of Graves (above) expresses our view: "While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination."

The only other ground relied upon for reversal is in connection with the instructions. At the request of respondent, the court gave the following instructions:

"You are also instructed that where a person who unduly profits by a will, sustains a confidential relation to the testator and has actually participated in procuring the execution of the will, the burden of proof is upon him to show that the will was not induced by undue influence; and if that burden has not been met, that is, if such a person has failed to show, by a preponderance of the evidence, an absence of such undue influence, then the presumption controls and such will is invalidated.

"You are also instructed that if you find that the proponent stood in a confidential relation to the decedent and participated in the procurement of the will, that the burden of proof is upon the proponent to establish that said will was not procured by his undue influence, and if said proponent fails to prove by a preponderance, that is, by the greater weight of evidence, that he did not unduly influence said decedent, then you will find for the contestant."

At the request of appellants the court also instructed the jury as follows: "In contests of this character the burden of proof always rests upon the contestants. They must establish the allegations of their contest affirmatively, and by a preponderance of evidence. If the evidence is evenly balanced or if there is any doubt in your minds on which side the evidence on any issue which the contestant must prove preponderates, then the contestants have failed to establish that issue and as to that issue your verdict should be against them."

[5-7] It is contended by appellants that the first two instructions are not correct statements of the law, in that: "The contestants at all times have the burden of proving their case by a preponderance of the evidence and when they have made out a prima facie case the burden which shifts to the proponent is not to overcome their showing by a preponderance of the evidence but merely to produce sufficient evidence to offset the effect of the contestant's showing;" and they cite Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Valente v. Sierra R. Co., 151 Cal. 534, 91 P. 481, and In re Estate of Erickson, 140 Cal.App. 520, 35 P.2d 628. We agree with appellants. The instructions were erroneous. "In the rebuttal of a presumption it is not necessary to produce preponderating evidence. A presumption is overcome by evidence sufficient to balance it." 10 Cal.Jur., p. 752, par. 66. "It is the general rule that the burden of proof as to the issues of fraud or undue influence is on the contestant or party who alleges their existence and exercise, and that such burden never shifts, although where the contestant establishes a prima facie case, the person charged with fraud or undue influence has the burden of meeting it." 68 C.J., p. 755, sec. 449. Furthermore, the error was aggravated by the fact that the second of these instructions omitted to give the third element necessary to raise the presumption

of undue influence,—the fact that proponent must have unduly profited by the will.

[8] The jury were also instructed that confidential relations were presumed to exist between "parent and child". The rule is that proof of the fact that the parties are mother and son is proof that the relation of confidence existed. Our courts do not stop with the holding that under such conditions a presumption of confidential relations arises, but they go further and say that the blood relationship actually proves confidential relations. In the early case of Robins v. Hope, 57 Cal. 493–497, it is said: "The phrases 'confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between 'client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors and administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith (uberrima fides) in all transactions between the parties.' (1 Story's Eq.Jur. 218.)"

[9] The later cases of Hemenway v. Abbott, 8 Cal.App. 450–463, 97 P. 190 (opinion on rehearing—opinion by this court) and Bacon v. Soule, 19 Cal.App. 428–434, 126 P. 384, use practically the identical language found in the Robins case. The instruction, while not an accurate statement of the law, was not prejudicially erroneous, in that the only error committed was failure to state the law against appellant as strongly as it might have been stated.

The following instruction was given: "You are also instructed that the presumption of undue influence arises from proof of the existence of a confidential relationship between a testator and his beneficiary coupled with activity on the part of the latter in the preparation of the will."

[10] This instruction omitted the third element necessary to give rise to the presumption—the fact that proponent unduly profited under the will—and it was therefore erroneous.

Objection is also made by appellant to this instruction upon the ground that the proof of the three elements, under the rule in Estate of Graves (above), does not give rise to a presumption but merely constitutes a showing from which the jury may deduce that undue influence has been exercised; hence, such proof simply lays the ground for an inference. The cases cited above—Estate of Graves and Estate of Baird—definitely hold otherwise, to the effect that such proof gives rise to a presumption of undue influence. The contention is without merit.

[11] It is stated by respondent that all of these instructions were given in Estate of Graves (above), and approved by the Supreme Court. The only reference made to such instructions in that case is as follows: "In answer to other contentions of appellant, it may be said that the trial court correctly instructed the jury at length, and with a great attention to detail." We have not examined the record in Estate of Graves, but assume that counsel is correct in his statement. However, we do not regard instructions which are not directly passed upon by the appellate court, but which are given such a "blanket endorsement" as definitely establishing the law.

[12] We do not believe that article VI, section 4½, of the Constitution is applicable here. Similar instructions were held to be prejudicially erroneous in Re Estate of Erickson, 140 Cal.App. 520–526, 35 P.2d 628. It is true that the trial court here gave the usual and proper instruction (quoted above) to the effect that contestants must establish their case by a preponderance of the evidence, but to say elsewhere that contestee must overcome the presumption of undue influence by a preponderance of evidence on his part is contradiction with attendant confusion.

We conclude by stating that we cannot say, after an examination of the entire record, that the jury would have reached the same conclusion had these instructions been correct statements of the law.

The judgment and orders are, and each of them is, reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

33 Cal.App.2d 375

### In re ZENS' ESTATE.

### LOS ANGELES ORPHANS' HOME SOC. et al. v. HAAS et al.

Civ. 12170–S.

District Court of Appeal, Second District, Division 1, California.

June 16, 1939.

Hearing Denied Aug. 14, 1939.

**1. Wills ⇐706**

Under will bequeathing residuary estate, if any, to the "Protestant Orphan Asylum of Los Angeles, California, by whatsoever name it may be legally known," whether testatrix intended general disposition of residue of estate for care, maintenance, and religious instruction of orphans and needy children, or had in mind the specific institution which she intended as recipient of her bounty, was primarily for the trial court.

**2. Wills ⇐706**

In construing a will, trial court's determination of issues is final, when there is some evidence to support findings of fact and conclusions are sound and correct as to the law, and judgment will be sustained on appeal in absence of prejudicial error.

**3. Wills ⇐489(6)**

Evidence sustained finding that under will bequeathing residuary estate to the "Protestant Orphan Asylum of Los Angeles by whatsoever name the same may be legally known," that the "Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles" came more nearly within provisions of will than other claimants and that legacy should be distributed to such claimant to be used for orphans and other needy children.

**4. Wills ⇐517**

Where there was no proof sufficient to identify legatee under will devising residuary estate to "Protestant Orphan Asylum of Los Angeles, California," and court found that "Church Home and Children of the Protestant Episcopal Church in the Diocese of Los Angeles" came more nearly than other claimants within provisions of the will and testamentary intent of testatrix, residuary legacy did not lapse but was properly ordered to be distributed to such charitable institution.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Proceeding in the matter of the estate of Katharine Zens, deceased, wherein Lucile P. McGuire, as administratrix of the estate of Ludwig Mueller, deceased, filed a petition for order determining heirship and interest in the estate, which was opposed by John B. Haas, as administrator with the will annexed of the estate of Katharine Zens, deceased, and others. From the decree, the Los Angeles Orphans' Home Society and Lucile P. McGuire appeal.

Affirmed.

Chapman & Chapman, of Los Angeles, for appellant Los Angeles Orphans' Home Soc.

Louis Thomsen, of Los Angeles, for appellant Lucile P. McGuire.

Waldo & Waldo, of Pasadena (George E. Waldo, of Pasadena, of counsel), for respondent Church Home for Children of Protestant Episcopal Church of Diocese of Los Angeles.

DORAN, Justice.

Decedent herein, Katharine Zens, died April 25, 1929, leaving a will dated December 29, 1928, which was duly admitted to probate. At the time of her death, her only heir-at-law was her brother, Ludwig Mueller, a resident of Germany. Subsequently, and prior to the proceeding hereinafter referred to, said Ludwig Mueller died, leaving heirs, all foreign residents. One Lucile McGuire was appointed administratrix of Ludwig Mueller's estate.

The will of Katharine Zens by its terms provided, among other things, as follows: "Tenthly. I hereby devise and bequeath all the rest and residue of my estate, if any, to the Protestant Orphan Asylum of Los Angeles, California, by whatsoever name the same may be legally known."

On behalf of Lucile P. McGuire, as administratrix of the estate of Ludwig Mueller, deceased, a "Petition for Order Determining Heirship and Interests in Estate" was filed, which alleged in substance (and particularly as affecting the within appeal), that the purported gift to "The Protestant Orphan Asylum of Los Angeles" was void for the alleged reason that no organization of that name or a similar name was in existence; that there were a number of organizations coming within the category of this designation in Los Angeles and that it was impossible for the court to determine which one, if any, the testatrix had in mind; that Katharine Zens died intestate as to said void portion of the will and that the residue of her estate should be distributed to her heirs.

Separate answers were filed in behalf of the "Children's Home Society of California", "The Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles" and the "Los Angeles Orphans' Home Society". Each of these institutions claimed the benefits of the provisions of the aforementioned tenth paragraph.

After a hearing, and based upon its findings that:

"There was not in Los Angeles city or Los Angeles county at the date of the execution of the will, nor at any time since, any institution having the name 'Protestant Orphan Asylum of Los Angeles'; that no sufficient proof was offered to identify the institution Katharine Zens intended to name as legatee in the tenth paragraph of her will; and that the testamentary intent of Katharine Zens was a 'general charitable intent' for the care, maintenance and religious instruction of orphans and needy children in a Protestant institution", the court concluded as follows:

"That no proof sufficient to identify the legatee intended by the testatrix, Katharine Zens, in the tenth paragraph of her will, having been offered, and her testamentary intent being a general charitable intent for the care, maintenance and religious instruction of orphans and other needy children in a Protestant institution to receive such legacy to be used by it for the charitable purposes intended by said Katharine Zens, the court in the exercise of its general equity powers decides that the 'Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles, in its name, * * purposes and conduct comes mere nearly than either of the other claimants, within the provisions of the will and testamentary intent of said Katharine Zens, and that it does come within the provisions of the said will and testamentary intent, and that said residual legacy should be distributed to said 'Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles', to be used for this intended charity for orphans and other needy children." Judgment was entered accordingly.

The Los Angeles Orphans' Home Society, and, likewise, Lucile P. McGuire, as administratrix of the estate of Ludwig Mueller, deceased, appeal from the judgment and decree; the appeals are based upon an engrossed bill of exceptions.

Although conceding that the rules of construction applicable to the determination of the questions here involved are liberal and, as pointed out by respondent, that "courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law" (In re Estate of Peabody, 154 Cal. 173, 178, 97 P. 184, 186; see, also, In re Estate of Willey, 128 Cal. 1, 12, 60 P. 471; In re Estate of Merchant, 143 Cal. 537, 540, 77 P. 475; Fay v. Howe, 136 Cal. 599, 602, 69 P. 423), nevertheless, it is urged by Los Angeles Orphans' Home Society that the evidence does not support the conclusion of the court that the institution mentioned "comes more nearly * * * within the provisions of the will and testamentary intent of said Katharine Zens" than any other claimant. In that connection it is argued that while the testatrix intended a charitable devise, on the other hand, a general disposition of the residue of her estate "for the care, maintenance and religious instruction of orphans and needy children", as found by the court, was not intended; that the testatrix had in mind a specific institution which she intended as the recipient of her bounty.

[1-3] Primarily the questions sought to be raised on appeal were addressed to the judgment and discretion of the trial court. The record reveals that, in addition to the will itself, considerable evidence was received for the court's consideration in determining the issues involved. Although such evidence may give rise to, and frequently does under such circumstances justify, a difference of opinion, the trial court's determination of the issues is final when there is some evidence to support the findings of fact, and the conclusions are sound and correct as to the law. Such a judgment will be sustained on appeal in the absence of prejudicial error.

[4] Appellant Lucile P. McGuire as administratrix of the *Estate of Ludwig Mueller,* deceased, contends that "there

being no organization capable of taking under the will, as the court found 'no proof sufficient to identify the legatee', * * * this residuary legacy lapses and the residue of her estate should be distributed to her heirs". In re Estate of Casement, 78 Cal. 136, 20 P. 362, 364, is authority for the court's action and definitely disposes of the above contention. In the Casement case the court held as follows: "There was evidence on the part of appellant [Old People's Home] and the respondent the Protestant Episcopal Old Ladies' Home, attempting to show that each of them was the person referred to in the will; and the court below having heard all the evidence, and found it to be insufficient to entitle either of them to the legacy, we cannot disturb the finding. We may suggest, however, that, as the final order of distribution did not dispose of this legacy, and no disposition has yet been made of it, that it is still subject to the claim of the parties to this action. We may say further that the respondent the Protestant Episcopal Old Ladies' Home *comes more nearly within the provisions of the will than either of the other claimants,* and that, under the liberal rules of construction applicable to legacies to charitable institutions, the court might properly have distributed the money to it." (Italics added.)

For the foregoing reasons the judgment and decree appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

---

## In re BAXTER'S ESTATE. *

**RICHARDSON et al. v. ROYAL INDEMNITY CO.**

**Civ. 2340.**

District Court of Appeal, Fourth District, California.

June 20, 1939.

Hearing Granted Aug. 18, 1939.

**1. Executors and administrators 🔑513(1)**
**Guardian and ward 🔑163**

The final account of a guardian or of an executor, when settled and approved and not directly attacked by appeal or otherwise, is res judicata.

**2. Executors and administrators 🔑513(9)**

An order settling a final account is not conclusive as to matters not included in the account or necessarily involved therein.

**3. Executors and administrators 🔑513(9)**
**Insane persons 🔑42(3)**

The final account of a guardian of an incompetent person was not subject to attack on accounting of guardian as administrator of incompetent's estate on ground that guardian had not accounted for securities other than money in his possession, where amount of money or property with which guardian was chargeable was presented to and passed on by court in final account of guardian.

**4. Executors and administrators 🔑508(1)**

In proceeding on final account filed by administrator of estate of deceased administrator as and for account of deceased administrator in original estate, court was not bound by allegations contained in account but had duty to settle account in accordance with facts as found and with the law.

**5. Executors and administrators 🔑510(9)**

In proceeding on final account of deceased administrator, reviewing court would assume that trial court's finding that deceased administrator was not to be charged with interest on entire amount with which he was chargeable from year in which he filed first and final account was supported by evidence, where bill of exceptions showed that bond was reduced in that year for reason that estate could not then be closed and no other evidence was before reviewing court.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Anna Baxter, deceased, wherein Charles T. Chandler was appointed administrator, and on his death F. L. Richardson was appointed administrator. An amended final account was filed by J. W. Hale and another, as administrators of the estate of Charles T. Chandler, which was opposed by the Royal Indemnity Company, which was the surety on the bond of Charles T. Chandler as administrator, and from an order settling the final account, the administrator of the estate of Anna Baxter, deceased, and the administrators of the estate of Charles T. Chandler, deceased, appeal.

---

*For subsequent opinion see 99 P.2d 27(

Affirmed.

Wade Garfield and F. L. Richardson, both of San Diego, for appellants.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order settling the final account of a deceased administrator in this estate.

On April 18, 1919, one Charles T. Chandler was appointed guardian of the estate of Anna Baxter, an incompetent person. She died on March 2, 1922, and on May 8, 1922, Chandler was appointed administrator of her estate. On June 5, 1922, he filed his third and final account as guardian, which was approved on June 16, 1922. Shortly thereafter he filed in the guardianship proceeding a receipt as administrator from himself as guardian, acknowledging receipt of $31,295.25 "in money, property and securities belonging to said estate, the same being all of the property of said estate" and also filed in the probate estate an inventory listing cash and other assets in a similar amount, with some added interest.

On May 11, 1925, Chandler filed his first and final account and petition for discharge as administrator. Upon stipulation, the hearing of this was stricken from the calendar. On July 3, 1925, he filed an application for a reduction of his bond as administrator alleging that the estate had all been distributed except $1,278.03 but that the same could not be closed until an ancillary estate in Iowa had been settled. The court found the material facts and reduced the bond from $30,000 to $2,000. Chandler died in September, 1935, no further proceedings having been taken in this estate.

In June, 1937, F. L. Richardson was appointed administrator of the estate of Anna Baxter, deceased, and in September, 1937, R. F. Smith was appointed administrator of the estate of Charles T. Chandler, deceased. In March, 1938, Smith, on behalf of the Chandler estate, filed an amended final account in the Baxter estate in which he alleged that Chandler, as administrator, had received from himself as guardian about $17,000 more than he had receipted for to the guardianship estate, and more than he had charged himself with in his final account filed on May 11, 1925. The surety on Chandler's bond as administrator filed objections to this amended account. After a hearing the court found that this portion of the money and property received by Chandler as administrator was of the total value as set forth in his final account as guardian, and in his inventory as administrator. It was further found that after deducting credits to which he was entitled, Chandler was chargeable with $623.83. From the order entered approving the account this appeal was taken.

It is not contended that Chandler, as administrator, received anything after the close of the guardianship proceeding for which he has not accounted. The sole contention is that in his final account as guardian he did not set forth the full amount of property in his hands as such guardian. The point here made by the appellants is that the court erred in refusing to receive in evidence the first and second accounts and two inventories which had been filed by Chandler in the guardianship proceeding. It is argued that these instruments would have shown that the final account filed by Chandler in the guardianship proceeding failed to set forth and include certain securities which were then in his hands as such guardian. The respondent contends that the order approving Chandler's final account as guardian is res judicata and may not be thus collaterally attacked. The appellants argue that they are not attacking that account and the order approving the same, but are only seeking to interpret their real meaning. In support of this they argue that the said final account only purported to cover the cash which had been received by the guardian, without mentioning certain securities in his hands, and that the order approving said final account went no farther.

In his final account as guardian Chandler set forth that upon the approval of his second annual account "there remained in his hands, as shown thereby, money and funds belonging to said estate" in a certain amount, that since said time he had received from all sources certain other named amounts, and that his expenditures totaled a certain sum, leaving a balance of $31,295.25. The prayer was that his said account be approved and allowed and that he be ordered to turn over to himself, as administrator of the estate of Anna Baxter, deceased, "all money and other personal property in his hands belonging to said ward". In its order approving that account the court, after stating that it had examined the account and heard evidence in support thereof, found that the same contained a true and correct statement of all sums which the guardian had received since his second annual account and contained "a true and correct statement of all funds and property in his hands belonging to said estate". The account was approved and Chandler, as guardian, was ordered to deliver to himself, as administrator, all the property, money and funds in his hands belonging to the guardianship estate. A receipt was filed in the guardianship estate acknowledging the receipt by Chandler, as administrator, of the sum of $31,295.25 "in money, property and securities belonging to said estate, the same being all of the property of said estate as shown by the final account and report of said guardian herein".

[1, 2] It is well settled that the final account of a guardian or of an executor, when settled and approved and which has not been directly attacked by appeal or otherwise, is res judicata and conclusive. Adams v. Martin, 3 Cal.2d 246, 44 P.2d 572; Ringwalt v. Bank of America etc., 3 Cal.2d 680, 45 P.2d 967; Carr v. Bank of America etc., 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282; Perna v. Bank of America, etc., 28 Cal.App.2d 372, 82 P.2d 605. The appellants rely upon the case of In re Estate of Clary, 203 Cal. 335, 264 P. 242, 244, in which it was pointed out that an order settling a final account is not conclusive as to matters not included in the account or necessarily involved therein. In that case the court held that where one of two coexecutors had died the acts of the deceased executor were not necessarily involved or approved in an order approving the acts of the surviving executor. It was there recognized, however, that "'A final settlement is conclusive as to all matters, the proper subject of account, included in such a settlement or necessarily involved therein' ".

[3] In the instant case, the amount of money or property with which the guardian was chargeable was not only a proper subject of account but was actually presented to and passed upon by the court in the final account of Chandler as guardian and the court's order approving the same. It was, therefore, conclusive in so far as the proceeding here in question was concerned. The case of In re Estate of Madsen, Cal. App., 87 P.2d 903, was similar in principle to the case now before us. In that case, as here, an attempt was made to attack the final order of a probate court in a subsequent probate proceeding. This may not be done.

[4] Some contention is made that the court could not "legally approve" the final account filed by the deceased administrator, since it had not been brought on for hearing in his lifetime and since the administrator of his estate, in his behalf, had filed and presented a different account. The court passed upon the matter as raised and presented by the amended final account filed by the administrator of Chandler's estate as and for the account of Chandler in the original estate. The court, however, was not bound by the allegations contained in that account, but was under the duty of settling the account in accordance with the facts as found and with the law.

[5] It is finally contended that the court erred in not finding that Chandler was chargeable with interest at 7 per cent on the entire amount of $623.83, compounded annually from November 11, 1925. The court did find that such interest should be allowed on $407.94 of this sum. Interest on this portion was allowed to compensate one of the heirs who had not participated in a partial distribution received by other heirs of Anna Baxter, deceased. It is argued that it is "apparent that this estate could have been settled" in 1925, and that compound interest on the remaining $215.89 should have been added. The bill of exceptions shows that the bond was reduced in 1925 for the reason that the estate could not then be closed. No other evidence is before us and it must be assumed that the court's finding that Chandler should not be charged with interest on the balance of the $623.83 was sustained by the evidence.

The order appealed from is affirmed.

I concur: MARKS, J.

13 Cal.2d 729

## PEOPLE v. MAHONEY.

L. A. 16757.

Supreme Court of California.
June 28, 1939.

**1. Appeal and error 🔑110**

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

**2. Evidence 🔑584(1)**

"Proof" as defined by statute providing that "proof" is the effect of evidence, the establishment of a fact by evidence, is something more than evidence. Code Civ.Proc. § 1824.

[Ed. Note.—For other definitions of "Proof," see Words & Phrases.]

**3. Licenses 🔑32(2)**

Under statute providing that certificate of sales tax delinquency shall be prima facie evidence, in action to collect delinquent taxes, of levy of the tax, of delinquency, and of equalization board's compliance with the act, certificate of delinquency is proof of such fact and as such is sufficient to prove the case for the plaintiff until contradicted and overcome by other evidence. St.1935, p. 1265, § 30; Code Civ.Proc. §§ 1824, 1833.

**4. Licenses 🔑32(2)**

Under provision of Retail Sales Tax Act that certificate of sales tax delinquency shall be prima facie evidence, in action to collect delinquent taxes of levy of tax, of delinquency, and of equalization board's compliance with the act, the word "levy" is used in comprehensive sense of the formal and official action of the legislative body invested with power of taxation, whereby it determines and declares that tax of certain amount or of certain percentage of value shall be imposed on person and property subject thereto importing the performance of such acts as would authorize tax collector to proceed to collect taxes. St.1935, p. 1265, § 30.

[Ed. Note.—For other definitions of "Levy," see Words & Phrases.]

**5. Trial 🔑178**

On defendant's motion for directed verdict, evidence conflicting with evidence favorable to plaintiff must be disregarded, and if there remains no evidence of sufficient substantiality to support a verdict, the motion may be granted, otherwise not.

**6. Evidence 🔑591**

In action to recover alleged delinquent sales taxes, evidence given by defendant when called by plaintiff as witness under statute was not binding on the plaintiff. St. 1933, p. 2599, as amended; Code Civ.Proc. § 2055.

**7. Trial 🔑178**

In action to recover alleged delinquent sales taxes, on defendant's motion for directed verdict, testimony given by defendant when called as witness by plaintiff under statute would weigh for plaintiff in so far as it was favorable and in so far as it was unfavorable it would be disregarded. St.1933, p. 2599, as amended; Code Civ.Proc. § 2055.

**8. Licenses 🔑32(2)**

In action against retailer to recover alleged delinquent sales taxes, evidence produced by defendant contrary to prima facie case established by certificate of delinquency under statute including evidence produced by him when called as witness by the state under statute created conflict to be resolved by jury under appropriate instructions. St. 1933, p. 2599, as amended; Code Civ.Proc. § 2055.

HOUSER, J., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the People of the State of California against Paul Mahoney to recover alleged delinquent sales taxes. Judgment for defendant and plaintiff appeals.

Reversed.

Prior opinion, 82 P.2d 469.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

Maurice J. Hindin, of Los Angeles, for respondent.

Wyckoff, Gardner & Parker, of Watsonville, and Hubert Wyckoff, Jr., of San Francisco, amici curiae.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment on a directed verdict in favor of the defendant in an action to recover alleged delinquent sales taxes.

[1] The complaint alleged that the defendant was a retailer selling tangible personal property, and as such was liable to the State of California for certain sales taxes, penalties, and interest on account of business done from April 1, 1934, to June 30, 1937, pursuant to the provisions of the Retail Sales Tax Act (Stats.1933, p. 2599, as amended, Stats.1935, pp. 1225 and 1252, 1256, and Stats.1937, pp. 1326 and 2222). The defendant answered, denying that he was indebted to the state for sales taxes in any amount whatsoever. At the conclusion of the plaintiff's case a motion for a nonsuit was denied. When the evidence was all in the court granted the defendant's motion for a directed verdict. In addition to the appeal from the judgment an appeal from an order denying the plaintiff's motion for a new trial was noticed. The latter appeal is dismissed for the reason that the order is not appealable. Code Civ.Proc. sec. 963; Perumean v. Wells, 8 Cal.2d 578, 67 P.2d 96.

In the proceeding against the defendant the board purported to act on information in its possession that the defendant had made incomplete and insufficient returns on the business conducted by him and that he should be required to pay an additional tax on his retail sales. In this respect the board acted under the authority granted by section 17 of the act which provides in part as follows: "For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the board is not satisfied with the return and payment of tax made by any retailer, it is hereby authorized and empowered to make an additional assessment of tax due from such retailer based upon the facts contained in the return or upon any information within its possession or that shall come into its possession." St.1937, p. 2224.

In support of its case the plaintiff offered in evidence the defendant's "Application for Permit to Engage in Business as a Retailer", dated September 28, 1934, and to conduct a cafe at 2811 Ocean Park boulevard, Santa Monica, and an application dated April 27, 1937, to conduct a similar business at 2921 Ocean Park boulevard. There was also received in evidence on behalf of the plaintiff a duly certified certificate of sales tax delinquency, dated February 8, 1938, showing that the state board of equalization had made the assessment of the sales taxes against the defendant to enforce the collection of which this action was brought.

The record does not disclose the grounds on which the trial court directed the verdict. The main argument of both parties is addressed to the question of the sufficiency of the certificate of delinquency, issued pursuant to section 30 of the act, St.1935, p. 1265, to establish a prima facie case for the state, and that question is therefore the principal question on this appeal. Section 30 provides, in part, that the board may bring an action in the name of the people to collect the "amount delinquent, together with penalties", and that "in such action a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency and of compliance by the board with all provisions of this act in relation to the computation and levy of the tax."

The defendant does not question the effect of the foregoing language as establishing prima facie the facts which it purports to establish, but contends that the certificate of delinquency under that section does not establish a prima facie case as distinguished from prima facie evidence of such facts. It is also pointed out that in addition to the introduction of the certificate of delinquency the plaintiff introduced documentary evidence of certain returns submitted by the defendant to the board of retail sales during some of the time in question and of payment of the sales tax in accordance with those returns. It is then argued that in order to prove its case it was necessary for the plaintiff to prove that the defendant transacted more business than his returns showed and that the certificate of delinquency could not serve to establish prima facie that such additional business was done.

[2, 3] Section 1833 of the Code of Civil Procedure provides: "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence * * *", and section 1824 of the same code provides: "Proof is the effect of evidence, the establishment of a fact by evidence". See Moore v. Hopkins, 83 Cal. 270, 23 P. 318, 17 Am.St.Rep. 248. Proof is something more than evidence. When, therefore, the certificate of delinquency is made prima facie evidence of the facts it pur-

ports to establish under section 30 of the act, it is proof of those facts and as such is sufficient to prove the case for the plaintiff "until contradicted and overcome by other evidence".

Without the benefit of section 30 of the act it is assumed that in order to make out a case against a delinquent taxpayer under this statute it would be necessary for the state to prove that the tax had been levied in accordance with the statute; that the defendant had been engaged in a business which would subject him to the tax; that the transactions on account of which the tax was assessed had taken place, and that the tax had not been paid. With these matters established the defendant would have to "assume the burden of proving any illegality, defect, or ground of non-liability on which he relies to defeat the action * * *". 61 Cor.Jur. §§ 1401, 1403, pp. 1063, 1065.

With the aid of section 30 we are satisfied that the certificate of delinquency established, prima facie, the essential proof of the plaintiff's case. That certificate recited that the board had made the assessment under this statute; that it had been made against the defendant by name, giving his address and place of business, and stating period for which the assessment was made, the amounts with penalties and interest, and that the defendant had become indebted in the amounts named, no part of which had been paid. This certificate showed the delinquency of the defendant and the statute by its terms then made the certificate prima facie evidence of such delinquency, of the levy of the tax and of compliance by the board with all provisions of the act in relation to the computation and levy of the tax.

It is true that the statute does not provide specifically that the certificate of delinquency shall constitute prima facie evidence of the plaintiff's case; but it is not essential that those particular words be used so long as words of similar import and equal significance be employed. Section 30 of the act, supplemented by the code sections above cited, was sufficient to constitute the certificate prima facie proof of the plaintiff's cause of action and as such sufficient to put the defendant on his proof, if any he had, of any invalidity, irregularity or ineffectiveness of the tax.

The terms of section 30 of the act are as broad and inclusive as those of other statutes having similar provisions and upheld as sufficient to put the defendant to his proof. The numerous statutes to the same effect are not cast in the same mould. The general purpose of all of them, however, is to place the burden on the party attacking the validity of the tax to prove the ineffectiveness of the same, and any statutory provision designed fairly to accomplish that result is sufficient.

Section 49 of the "California Irrigation District Act" (Stats.1897, p. 254; Deering's Gen.Laws, 1937, Act 3854, p. 1792, at p. 1835), as originally adopted and as still in effect, provides that the assessment-book or delinquent list, certified by the collector, "showing unpaid assessments against any person, or property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of assessments due and unpaid, and that all the forms of the law in relation to the assessment and levy of such assessments have been complied with". There is nothing in this section which in terms makes the assessment-book or delinquent list so certified a prima facie showing of the plaintiff's case, as distinguished from prima facie proof of facts sufficient to establish the plaintiff's case. This court said in Miller & Lux, Inc. v. Secara, 193 Cal. 755, at page 771, 227 P. 171, at page 176, with reference to the effect of the introduction of an irrigation district assessment-book in evidence on behalf of the defendants: "By so doing the defendants established a prima facie case of the validity of the assessment and of the fact that all the forms of law in relation to the assessment and levy had been complied with. This showing would not only justify but would compel a finding to this effect unless it was both contradicted and overcome by other evidence in the case".

The laws of this state providing that a delinquent list shall be sufficient to establish a prima facie case in an action to enforce the collection of a tax are of early origin. In 1860 the legislature passed an act providing that in an action to collect an ad valorem tax the delinquent list, duly certified, should be evidence "to prove the delinquency, property assessed, the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment of such taxes have been complied with." Stats. 1860, pp. 139, 140. This provision was under attack in the case of People v. Seymour, 16 Cal. 332, 76 Am. Dec. 521. It was held that the terms of the act providing for prima facie proof of liability in an action to collect the tax merely affected the remedy, and was not open to any constitutional objection—in effect leaving the defense to show that the defendant was not liable. "Such seems to be the evident design of the act", said the court.

The statute of 1860 was re-enacted in almost identical language in 1872 and incorporated in the Political Code as section 3789. (Amendments to the Codes, 1873–4, pp. 149, 150; approved March 24, 1874). On the 28th day of the same month an act was approved providing for the levy of a tax for state purposes, in the enforcement of which it was provided that the delinquent list, duly certified, "shall be prima facie evidence of the validity of the assessment, that the amount therein stated is due, and of every fact necessary to maintain the action." Stats. 1873–4, p. 748, sec. 15. The early statutes, with their varying phraseologies, were upheld and applied by this court in numerous cases. People v. Donnelly, 58 Cal. 144; San Francisco v. Phelan, 61 Cal. 617; Lake County v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 P. 876; Modoc County v. Churchill, 75 Cal. 172, 16 P. 771; San Gabriel Valley Land & Water Co. v. Witmer Brothers Co., 96 Cal. 623, 29 P. 500, 31 P. 588, 18 L.R.A. 465, 470.

Uniformity in language appears in numerous later statutes providing that a certified assessment-book or delinquent list shall constitute prima facie evidence. Except for the name of the appropriate board or officer whose duty it is to administer the same, the following statutes contain language identical with the language of section 30 of the act here in question: The Bank and Corporation Franchise Tax Act of 1929 (Stats.1929, p. 19, sec. 31, as amended, Stats.1937, p. 2346); the Personal Income Tax Act of 1935 (Stats.1935, p. 1090, sec. 28); the Use Tax Act of 1935 (Stats.1935, p. 1297, as amended Stats.1937, p. 1935, at p. 1944); the Private Car Tax Act of 1937 (Stats.1937, p. 621, at p. 624); the Corporation Income Tax Act of 1937 (Stats.1937, p. 2184, at p. 2199). A variation in language but with no change in legal effect is found in the Motor Vehicle Fuel License Tax Act of 1923 (Stats.1923, p. 571, as amended Stats.1931, p. 105, at p. 111), and the Highway Carrier's Licensing Law of 1933 (Stats.1933, p. 928, as amended Stats.1937, p. 1919, at p. 1930).

[4] Similar provisions of other taxing statutes might be referred to but sufficient examination has been made to indicate beyond question that it has been the intention of the legislature from the early history of the state to make the copy of the assessment-book or delinquent list, duly certified, prima facie evidence of the right to enforce payment of the tax or assessment involved, and that when such showing has been made the burden is placed on the defendant to show the extent of any claimed non-liability. There is no reason to accord the language of section 30 of the act here under consideration any significance other than that given the earlier statutes enacted for the same purpose. In fact the term "levy" as used in this statute may well be given a definition in accord with the comprehensive meaning ascribed to it in numerous authorities cited in support of the text in 61 Corpus Juris at page 551, where it is said that in its proper sense "it is the formal and official action of a legislative body invested with the power of taxation—whether national, state or local—whereby it determines and declares that a tax of a certain amount, or of a certain percentage or value, shall be imposed on persons and property subject thereto". In Moore v. Foote, 32 Miss. 469, 479, it was said: "The term levy, imports * * * the performance of such acts * * * as would authorize the tax-collector to proceed to collect the taxes." When the statute makes the certificate of delinquency prima facie evidence of the "levy" as so defined, and also like evidence of compliance by the board with all provisions of the act in relation to the levy and of the delinquency in payment, no more would seem to be required to establish a prima facie case.

[5] The defendant advances the argument that since the plaintiff introduced evidence to the effect that the defendant had paid some sales taxes during the period in question, it was incumbent on the state also to prove that the defendant had not paid all the taxes for that period which were properly chargeable against him. The argument seems to be that, assuming the prima facie showing of the certificate of delinquency, the plaintiff has destroyed its prima facie showing by the additional evidence it produced. The contention cannot be sustained for we are at once confronted with the rule in this state with reference to what evidence may be considered on a

motion for a directed verdict. This rule has been repeated so often that a restatement would seem to be unnecessary. A recent case in which it was reiterated is Engstrom v. Auburn Automobile Sale Corp., 11 Cal.2d 64, 77 P.2d 1059. Under the rule the evidence conflicting with evidence favorable to the plaintiff must be disregarded. If there remains no evidence of sufficient substantiality to support a verdict the motion may be granted, otherwise not.

[6, 7] The additional evidence produced by the plaintiff consisted first of the testimony of the defendant called under section 2055 of the Code of Civil Procedure. This evidence was not binding on the plaintiff. But on the motion for a directed verdict it would weigh for the plaintiff in so far as it was favorable. In so far as it was unfavorable it would be disregarded. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825. The testimony of the defendant showed that he was engaged in the retail business of selling refreshments, confections, tobaccos, etc., across the street from the plant of the Douglas Aircraft Company in Santa Monica; that the business was run in three units in each of which were one or more cash registers; that those units were run as retail establishments under the name of the defendant and during the period in question with no retail sales permit applicable thereto other than the one issued to the defendant; that the defendant made certain returns to the board and paid the tax in accordance therewith, but that he did not make a return for all of the units nor pay a tax for the operation of all of them. The defendant endeavored to show that he leased certain units on agreements to share the profits, that he was not liable on account of transactions in those units, and that he had paid all the taxes he was legally bound to pay.

Other evidence on behalf of the plaintiff was to the effect that an auditor of the board had made an extended investigation of the business of the defendant and had submitted his report to the board, including a report based on information obtained from those who were making the sales at defendant's place of business, and from those who had sold merchandise to the defendant for resale at said place of business, all of which tended to prove that the defendant had not made a true and correct return of his transactions to the board.

[8] There was nothing in the evidence produced by the plaintiff which as a matter of law would overthrow the prima facie case made by the certificate of delinquency. Whatever evidence was produced by the defendant contrary to the prima facie case established by the certificate of delinquency, including any such evidence produced by him when called as a witness under said section 2055, merely created a conflict to be resolved by the jury under appropriate instructions from the court.

The judgment is reversed.

We concur: SEAWELL, J.; LANGDON, J.; CURTIS, J.; SPENCE, Justice pro tem.

I dissent: HOUSER, J.

EDMONDS, Justice (concurring).

I concur in the order of reversal, but as I read the record it is unnecessary to consider whether a certificate of delinquency under the Retail Sales Tax Act is prima facie evidence of all of the facts necessary to support a judgment for taxes, and the court may not properly decide that question in the present case.

The evidence before the court at the time the defendant's action for a directed verdict was granted shows that in 1934 he applied for a permit to operate a cafe. He admitted that he conducted this business for some months after that date. He then bought a nearby lot, which is located across the street from a large industrial plant, and eventually erected three booths or stands upon this property. The defendant admits that for some of the time in controversy he conducted a retail business in one of these units. According to his testimony he sold cigars, tobacco, ice cream, soft drinks and newspapers. In another unit sandwiches and coffee were sold. Apparently the third unit was built much later than the other two and there is scant evidence concerning its use.

The state claimed taxes upon the sales made in the three units for the period from April 1, 1934, to June 30, 1937. In defending this claim Mr. Mahoney contended that he had operated one of the units for a portion of the time and that he had reported and had paid all amounts due it upon the sales made by him. At all other times during the taxable period in controversy, he testified, each of two units had been rented by him upon an agreement that he should be paid a share of the net profits, and, consequently his lessees were solely responsible for taxes due the state upon the sales made by them. However, the application of one of these persons for a permit to conduct a retail business as the successor of the defendant was denied.

Also, in contradiction of the defendant's contentions, the persons to whom he leased the premises and girls who worked in one or the other of the units at different times testified to facts from which the jury might reasonably have inferred that Mr. Mahoney, as alleged by the state, was conducting all of the business being transacted on the lot owned by him. Moreover, all of the units were under one roof and from the description of them by the witnesses, it is difficult to believe that they were more than departments of one business.

Under these circumstances there was sufficient evidence aside from the certificate of delinquency relied upon by the state, to support a judgment against the defendant upon the ground that he was conducting all of the business done in the three units. Much of this evidence was offered by the state, apparently for the purpose of proving the defendant's ownership of a business in which taxable sales were made. The right of the state to rely entirely upon the certificate to prove the existence of taxable transactions is, therefore, not a question properly before the court upon the record in the present case. However, not only is the judgment reversed upon that ground, but a construction is placed upon the statutory provision with which I cannot agree.

Proceedings under tax statutes are in invitum and the statute will be strictly construed in favor of the taxpayer and against the state. Barker Bros. v. Los Angeles, 10 Cal.2d 603, 608, 76 P.2d 97; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917; United States v. Merriam, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547; Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211. In an action to collect taxes the plaintiff must establish every fact essential to his right of recovery. "Any attempt on the part of the state * * * to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. Whether his property is to be taken by seizure or by suit, the rule is the same. In the one case the office must show his warrant for the seizure, and in the other the plaintiff must establish every fact essential to the maintenance of his right of recovery. In either case the proceeding is in invitum, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken." Merced County v. Helm, 102 Cal. 159, 165, 36 P. 399, 400; see, also, Estate of Potter, 188 Cal. 55, 64, 204 P. 826.

Under the statutory construction adopted by my associates, when the Board of Equalization issues a certificate of delinquency the state may sue thereon and rely entirely upon it to establish a cause of action. As against this certificate the defendant may show by the most conclusive evidence that he was not the owner of the business as claimed by the state and that he had no connection with it. Yet the trial judge or a jury may only consider this evidence as contradictory of the ex parte certificate of the administrative board and a judgment in favor of the state must be upheld.

This is contrary to all fundamental principles. The existence of taxable property or taxable transactions is necessary to the validity of a levy and assessment (Brenner v. Los Angeles, 160 Cal. 72, 76, 116 P. 397), and is a basic and fundamental fact which must be proved when put in issue in any action to collect a tax. This rule was applied in an earlier case where the effect of an assessment affirmed by the Board of Equalization was considered and the court said: "Even a body possessing powers so enormous, and in certain instances final jurisdiction, may not validate an assessment upon nonexistent property". Kern River Co. v. County of Los Angeles, 164 Cal. 751, 755, 130 P. 714, 715.

Unquestionably the legislature has the power to make official tax records or certificates prima facie evidence of a taxing body's right to recover amounts claimed to be delinquent. Such a provision affects only the remedy by shifting the burden of going forward with the evidence to the party who usually has a superior opportunity for knowledge of the facts. However, none of the decisions cited and relied upon in the opinion of my associates hold that evidence concerning the existence of transactions subject to a tax may be dispensed with. The validity of a statute allowing an assessment book or delinquent list, properly certified, showing amounts unpaid upon certain real property, to be offered as prima facie evidence of unpaid taxes, is determined by principles entirely different from those which apply to excise taxes. Moreover, all of the statutes which have been upheld by this court contain language much more definite and comprehensive than that used in the Retail Sales Tax Act.

---

13 Cal.2d 741

**McDONOUGH et al. v. GOODCELL, Insurance Com'r.**

**S. F. 16202.**

Supreme Court of California.

June 29, 1939.

Rehearing Denied July 29, 1939.

**1. Bail ⇨60**

The purpose of Bail Bond Regulatory Act was to regulate the business commonly known as the bail bond business. St.1937, p. 1797.

**2. Courts ⇨488(1)**

Where original mandamus proceeding is transferred from District Court of Appeal to Supreme Court, decision of District Court of Appeal is set aside and the matter is then pending in the Supreme Court the same as if originally lodged in Supreme Court, and decision of District Court of Appeal on conflicting evidence is not binding on Supreme Court.

**3. Bail ⇨60**

The conduct of bail bond business is such a business as is subject to reasonable regulation under police power of the state. St. 1937, p. 1797.

**4. Bail ⇨60**

In enacting Bail Bond Regulatory Act, Legislature properly determined that abuses had arisen or might arise which made it necessary or desirable that there be some public supervision of bail bond business. St.1937, p. 1797.

**5. Bail ⇨60**

The regulation that permit from some duly constituted authority be obtained as condition to transaction of bail bond business and that permit be denied to any person found not to be fit and proper person to engage in such business is reasonable. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.28.

**6. Bail ⇨60**

The Legislature had authority to confer on insurance commissioner the authority to ascertain whether applicant for permit to engage in bail bond business was of good moral character, and a fit and proper person to engage in such business. St.1937, p. 1798, § 1830.28.

**7. Licenses ⇨20**

The Legislature can vest in public officer the discretion to deny an application for permit to engage in a business subject to regulation when prerequisite facts do not exist.

**8. Licenses ⇨20**

A public officer's discretion to deny application for permit to engage in business subject to regulation when prerequisite facts do not exist must be exercised within legal bounds, and cannot be exercised arbitrarily.

**9. Officers ⇨103**

Where Legislature has clothed administrative officer with power to ascertain facts with reference to fitness of applicant for permit to engage in business subject to regulation under police power, and has vested in such officer the discretion, based on the facts ascertained, to grant or deny permit, courts will not interfere with exercise of such discretion except for abuse thereof.

**10. Bail ⇨60**

The insurance commissioner's denial of application for permit to engage in bail bond business would be an "abuse of discretion" if commissioner acted arbitrarily, capriciously, or fraudulently. St.1937, p. 1798, § 1830.-28.

[Ed. Note.—For other definitions of "Abuse of Discretion," see Words & Phrases.]

**11. Bail ⇨60**

The insurance commissioner's denial of application for permit to engage in bail bond business would be "arbitrary" so as to make denial an abuse of discretion, if there was no sufficient factual basis for denial. St. 1937, p. 1798, § 1830.28.

[Ed. Note.—For other definitions of "Arbitrary," see Words & Phrases.]

**12. Bail ⟹60**

The insurance commissioner's denial of application for permit to engage in bail bond business was not "arbitrary," and hence was not an "abuse of discretion," where testimony before commission would sustain a conclusion either way upon issue of good moral character and fitness of applicants to engage in such business. St.1937, p. 1798, § 1830.28.

**13. Bail ⟹60**

In proceeding before insurance commissioner on application for permit to engage in bail bond business, testimony of witnesses as to general reputation and fitness of applicants was admissible on issue of character. St.1937, p. 1798, § 1830.28.

**14. Bail ⟹60**

The insurance commissioner to whom application was made for permit to engage in bail bond business need not consider reasons why applicants had attained a bad general reputation if, in fact, they had acquired such a reputation. St.1937, p. 1798, § 1830.28.

**15. Bail ⟹60**

In proceeding before insurance commissioner on application for permit to engage in bail bond business, testimony that applicants were not men of good moral character was admissible, notwithstanding that acts of applicants upon which testimony was based occurred prior to enactment of bail bond statute providing that applicant for permit must be of good moral character and a fit and proper person to engage in such business. St.1937, p. 1798, § 1830.28.

**16. Bail ⟹60**

A person's "general reputation" is made up of what his neighbors and acquaintances think of him, basing their opinion on what they have observed or heard regarding his conduct in the past, as respects whether applicant for permit to engage in bail bond business is of good moral character and a fit and proper person to engage in such business as required by Bail Bond Regulatory Act. St.1937, p. 1798, § 1830.28.

[Ed. Note.—For other definitions of "General Reputation," see Words & Phrases.]

**17. Bail ⟹60**

Under statute providing that applicant for permit to engage in bail bond business must be of good moral character and a fit and proper person to engage in such business, applicant's reputation at time he attempts to qualify under statute is a material factor in determining his right to permit, notwithstanding that such reputation may have existed at time statute was passed. St.1937, p. 1798, § 1830.28.

**18. Bail ⟹60**

The conduct of applicant for permit to engage in bail bond business, with attorney against whom disbarment proceedings were instituted, could be considered by witnesses testifying as to whether applicant was of good moral character and a fit and proper person to engage in such business. St.1937, p. 1798, § 1830.28.

**19. Bail ⟹60**
**Constitutional law ⟹197**

The Bail Bond Regulatory Act authorizing granting of permit to engage in bail bond business to persons who are of good moral character and are fit and proper to engage in such business did not purport to prescribe a penalty for past delinquencies, but acted in futuro, and hence was not "ex post facto legislation." St.1937, p. 1798, § 1830.28.

[Ed. Note.—For other definitions of "Ex Post Facto," see Words & Phrases.]

**20. Constitutional law ⟹199**

That applicants for permit to engage in bail bond business under Bail Bond Regulatory Act authorizing granting of permit to persons who are of good moral character and are fit and proper to engage in business were denied right to engage in business by reason of their present existing inability to meet conditions imposed by act, did not make act "ex post facto" in its operation. St.1937, p. 1798, § 1830.28.

**21. Constitutional law ⟹287**

The enactment of Bail Bond Regulatory Act and the order of insurance commissioner denying application for permit to engage in bail bond business did not deprive applicants of their property without due process of law, notwithstanding that applicants had enjoyed for many years the unregulated right to conduct a bail bond business, where applicants were unable to make a showing of fitness as required by the act. St.1937, p. 1798, § 1830.28.

**22. Constitutional law ⟹287**

That valuable bail bond business was built up while such business was unregulated did not deprive Legislature of right under police power to enact regulatory legislation immediately effective on all engaged in the business, and making conduct of business unlawful except on reasonable requirement of showing of fitness to engage in such business. St.1937, p. 1798, § 1830.28.

**23. Constitutional law ⚷253**

The enactment of reasonable regulations under the police power results in no deprivation of property without due process of law.

**24. Constitutional law ⚷287**

The failure of bail bond regulatory act authorizing insurance commissioner to issue permit to engage in bail bond business only to persons of good moral character and fit and proper to engage in such business, to provide for notice and hearing, did not invalidate the act as depriving applicants for permit of due process, where applicants were given a hearing for purpose of enabling commissioner to determine whether right to engage in business should be granted to them. St.1937, p. 1798, § 1830.28.

**25. Bail ⚷60**

Under Legislature's constitutional power to regulate bail bond business, Legislature had the right to terminate bail bond business conditionally upon persons engaged therein securing permit upon a showing that they were of good moral character and fit and proper to engage in such business. St.1937, p. 1798, § 1830.28.

**26. Constitutional law ⚷88**

Where purpose of statute is to protect public from unfit persons, it is constitutional, although it disqualifies a person, by reason of past acts, from continuing in the practice of his profession or from remaining in his business.

◆

In Bank.

Original mandamus proceeding by Peter P. McDonough and another, copartners under the firm name and style of McDonough Bros., against Rex B. Goodcell, as Insurance Commissioner of the State of California, substituted for Samuel L. Carpenter, Jr., former Insurance Commissioner, to compel the respondent to issue a permit to the petitioners to transact a bail bond business in San Francisco.

Alternative writ discharged and peremptory writ denied.

Prior opinion, 84 P.2d 281.

Leon Samuels and Charles H. Brennan, both of San Francisco, for petitioners.

U. S. Webb and Earl Warren, Attys. Gen., and Neil Cunningham and Walter K. Olds, Deputy Attys. Gen., for respondent.

PER CURIAM.

This is an application for the writ of mandamus to compel the respondent Insurance Commissioner to issue to the petitioners a permit to conduct a bail bond business in San Francisco.

[1] The petitioners are copartners and as such had for many years conducted a bail bond business in San Francisco. In 1937 the legislature enacted the Bail Bond Regulatory Act (Stats.1937, p. 1797), the purpose of which was to regulate the business commonly known as the bail bond business. This statute was enacted as an amendment to the Insurance Code and is incorporated in sections 1830 to 1830.42, both inclusive, of that Code. Section 1830.20 provides that no person shall write or furnish bail bonds for compensation or engage in the bail bond business in the state without first securing a permit to do so from the Insurance Commissioner. The law went into effect on August 27, 1937.

In due form the petitioners filed their application with the Insurance Commissioner for a permit to conduct a bail bond business. By section 1830.24 of the act it is provided: "The commissioner may issue a written permit to any person wishing to engage in the bail bond business upon application therefor accompanied by proof that the applicant is a fit and proper person to engage in such business."

Obviously for the purpose of obtaining information of the facts concerning the fitness of the applicants to receive the requested permit the commissioner held public hearings at which the petitioners and all other parties interested were afforded full opportunity to be heard. The hearing commenced on October 6, 1937, and was concluded on October 23, 1937. More than forty witnesses were called and examined. Many documents were introduced in evidence. The transcript of the testimony taken at the hearing contains nearly one thousand pages. Numerous witnesses testified before the commissioner that the petitioners were of good moral character and numerous witnesses testified that their moral character was bad. After the hearing the commissioner denied the application on the ground that the petitioners were not persons of good moral character and that they were not fit and proper persons to engage in the bail bond business. The petitioners then sought to test the lawfulness of the order of denial by injunction proceedings and by habeas corpus proceedings, the decision in the latter being found in Ex parte McDonough, 27 Cal.App.2d 155, 80 P.2d 485. Being unsuccessful in both of those proceedings, and some nine months after the application for the permit was denied, the petitioners commenced the present proceedings in the District Court of Appeal. Upon the return to the alternative writ the matter was submitted on the petition and the answer and upon the transcript of the testimony taken and documents received at the hearing before the commissioner. By a divided court the District Court of Appeal entered an order granting the peremptory writ as prayed. A petition for hearing in this court was granted and after hearing and argument the matter is submitted to this court on the same record that was before the District Court of Appeal.

[2] A question of procedure will first be disposed of. The petitioners contend that in an original mandamus proceeding in that court, the District Court of Appeal is the trial court and that when evidence is there presented and the court on conflicting evidence has announced a conclusion thereon, such conclusion is binding on this court. In other words it is contended that in such a proceeding the District Court of Appeal is the trial court and this court the reviewing court, and that the same rules should apply to such a review as are applicable on an appeal from the superior court. There is no merit in the contention. The practice is too well settled to require extended notice. When an order of transfer from the District Court of Appeal to the Supreme Court is made the decision of the District Court of Appeal is set aside and the matter is then pending in this court the same as if originally lodged here. As applied to an original proceeding such as the present one a quotation from the case of Rockridge Place Company v. City Council, 178 Cal. 58, 60, 172 P. 1110, 1111, will be sufficient. It was there stated: "When such an order is made within the time prescribed in the Constitution, the decision of the District Court of Appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court. It is also immaterial that the opinion of the District Court of Appeal may not show any error upon its face, when considered without regard to the record. The practice established by our decisions (People v. Davis, 147 Cal. 346, 81 P. 718; Burke v. Maze, 10 Cal. App. 206, 215, 101 P. 438, 440; Rauer's Law etc. Co. v. Berthiaume, 21 Cal.App. [670] 675, 132 P. 596, 833), to the effect that in considering petitions for a hearing, in this court, of appeals required by our constitution to be taken to a District Court of Appeal, we will consider only the opinion of that court and will not look into the record, is confined to appeals, and has never been extended to original proceedings instituted in such courts. There are material differences between the two classes of matters, which, to our minds, preclude any such extension of the practice, or at least, render it inadvisable to declare any such rule as to original proceedings instituted in a District Court of Appeal. There is no question of power involved in this regard. The power exists as to all matters, and has been exercised in this particular matter, with the result that the proceeding is now here for determination on its merits." See, also, Estate of Stierlen, 199 Cal. 140, 248 P. 509.

[3-5] Coming to the merits of the present application for the writ it must first be said without hesitation that the conduct of a bail bond business is such a business as is subject to reasonable regulation under the police power of the state. The legislature has properly determined that abuses have arisen or may arise which make it necessary or desirable that there be some public supervision of that business. A contrary contention is entirely without merit. Also it may properly be concluded that one of the reasonable regulations which may be imposed is that a permit from some duly constituted authority be obtained as a condition to the transaction of such business, and that a permit may be denied to any person found not to be a fit and proper person to engage in such business. Section 1830.24 above quoted would seem to be sufficient authority to refuse a permit to a person who is not a fit and proper person to engage in the bail bond business. But to remove all doubt on that subject the legislature has provided in section 1830.28 as follows:

"The commissioner may refuse to issue any permit applied for unless it is made to appear that the applicant therefor is of good moral character and a fit and proper person to engage in the bail bond business."

[6] When the question arises as to who is to determine whether the applicant is a fit and proper person to engage in such business we necessarily look first to the statute and find that in this case it is the Insurance Commissioner. There can be no doubt of the power of the legislature to confer upon such an administrative officer the authority to ascertain the prerequisite facts. In Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 1297, 115 A.L.R. 1, it was said: "Agencies engaged in making administrative determinations, unlike courts, have the power and the facilities to investigate and initiate action and, more or less informally, find the facts which under the law justify a course of action. They cannot and do not declare the law but perform the sole duty of ascertainment."

[7, 8] The legislature has the power to vest in a public officer the discretion to deny an application for a permit to engage in a business subject to regulation when prerequisite facts do not exist. But such a discretion must be exercised within legal bounds. Those bounds are generally that the discretion of the administrative officer or board may not be exercised arbitrarily, capriciously, fraudulently, or without a factual basis sufficient to justify the refusal.

Numerous instances may be noted where the legislature has vested discretion in an administrative board or officer to ascertain the facts and in accordance with those facts, to grant or deny a permit to engage in a business which is so subject to regulation. In Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, the discretionary power vested in the Real Estate Commissioner was under attack. That act authorized the commissioner to refuse a license if he was not satisfied that the applicant was "honest, truthful and of good reputation". It was said (181 Cal. page 595, 185 P. page 857, 8 A.L.R. 418): "But it may be said that the power of the commissioner to refuse a license if he is not satisfied as to the character of the applicant practically gives him arbitrary power, as he alone can determine whether he is satisfied or not. This, however, is not true. While the commissioner has the power to refuse a license if he is not satisfied as to the character of the applicant, his discretion is not arbitrary. There must exist facts which reasonably justify his conclusion that the applicant is not of good character and reputation. If such facts do not exist, it is his duty to issue the license, and this duty can be enforced by the courts." See, also, Ex parte McManus, 151 Cal. 331, 90 P. 702; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140; People v. Monterey Fish Products Company, 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; Dominguez Land Corporation v. Daugherty, 196 Cal. 468, 238 P. 703; Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3; In re Halck, 215 Cal. 500, 11 P.2d 389; Cranford v. Jordan, 7 Cal.2d 465, 61 P.2d 45; Gundling v. Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann. Cas.1917C, 643; Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; Porter v. Investors' Syndicate, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226.

In People v. Monterey Fish Co., supra, this court said, 195 Cal. page 558, 234 P. page 402, 38 A.L.R. 1186: "The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor."

The Personal Property Brokers Act was involved in In re Halck, supra. The statute required the issuance of the license if the commission should find that "the financial responsibility, experience, character and general fitness" of the applicant were "such as to command the confidence of the community". St.1931, p. 560, § 10. This court said, 215 Cal. on pages 503, 504, 11 P.2d on page 391, in that case: "This means no more than that the commissioner may decline to license a person or entity if, on the showing made, there is a reasonable ground for the conclusion that the applicant would not operate his business honestly, fairly, or efficiently. This confers no arbitrary power. If the commissioner acts to the prejudice of an applicant, capriciously, arbitrarily, or solely without basis of right, his act may be supervised and controlled by the courts. The language complained of means no more than

similar language construed in the following cases: Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3; Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643."

[9] A survey of the foregoing authorities discloses that it is the settled general rule of law in this state that where the legislature has by statute clothed an administrative officer with power to ascertain the facts with reference to the fitness of an applicant for a permit to engage in a business subject to regulation under the police power and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit to engage in such business the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof. There may be modifications of this general rule under special circumstances not here present, as will hereinafter be noted.

[10, 11] The question here is whether the commissioner abused his discretion in denying the permit to the petitioners. Such abuse of discretion would appear if he acted arbitrarily, capriciously, or fraudulently. No claim can properly be made that he acted capriciously or fraudulently. And he acted arbitrarily only in the event there was no sufficient factual basis for his conclusions.

The testimony before the commissioner was voluminous and highly conflicting. It would serve no useful purpose to set it forth in detail. Many witnesses testified to the good moral character and fitness of the petitioners and many witnesses testified directly to the contrary. Among the latter were the District Attorney of the City and County of San Francisco, two assistant district attorneys, the Chief of Police of said city, a deputy attorney general of the state, the foreman of the grand jury, the president of the Junior Chamber of Commerce, a former president of the Police Commission of said city, and many others.

[12] Unquestionably the testimony before the commissioner would sustain a conclusion either way upon the issue of the good moral character and fitness of the petitioners to engage in the bail bond business in San Francisco. If the trial had been before a court the evidence was sufficient to support findings either way or was sufficient to support a verdict either way on the issue. With this state of the record our inquiry on this phase of the case is at an end, for it cannot be said that there was not a sufficient factual basis for the conclusion of the commissioner and therefore he did not act arbitrarily or otherwise abuse his discretionary power in denying the permit.

[13, 14] The petitioners attack the statements made by some of the witnesses who testified against them on the ground that they formed their conclusions as to the general reputation and fitness of the petitioners from the fact that one of them had recently theretofore refused to testify before the grand jury upon the ground that his testimony might tend to incriminate him. But it does not appear that the testimony of those witnesses was based solely on that ground. In any event their testimony was admissible on the issue of character and it was immaterial to consider the reasons why the petitioners had attained a bad general reputation if, in fact, they had acquired such a reputation, as the witnesses testified.

[15-18] The contention is made that many of the acts of the petitioners upon which some of the witnesses based their opinion that the petitioners were not men of good moral character occurred prior to the enactment of the bail bond statute and that this evidence was improperly admitted and considered by the commissioner. There is no merit in the point. A person's general reputation is made up of what his neighbors and acquaintances think of him, basing their opinion on what they have observed or heard regarding his conduct in the past. The enactment of the statute had nothing whatever to do with the reputation of the petitioners. Their reputation, good or bad, existed at the time the statute was passed, and when they attempted to qualify under the statute that reputation when proved was a material factor respecting their right to a permit to transact business pursuant to the provisions of the statute. The respondent asserts that the showing of the bad reputation of the petitioners dated back to the connection of one of them with the disbarment proceedings culminating in the Matter of the Accusation of the Bar Association of San Francisco v. Sullivan, 185 Cal. 621, 198 P. 7, and in the Matter of the Accusation of the San Francisco Bar Association v. Oppenheim, 186 Cal. 75, 198 P. 1069. While the petitioners were not

parties to those proceedings it cannot be said that the conduct of one of them with the accused and there subjected to public scrutiny and criticism could not form at least one of the predicates for the opinions expressed by some of the witnesses.

[19, 20] The petitioners' contention that the bail bond legislation is ex post facto is likewise without merit. The statute does not purport to prescribe a penalty for past delinquencies. It acts in futuro. See Foster v. Board of Police Commissioners, 102 Cal. 483, 37 P. 763, 41 Am.St.Rep. 194. The fact that the petitioners are denied certain privileges under the act by reason of their present existing inability to meet the conditions imposed by it in no wise affects its operation.

[21–23] It is contended by the petitioners that, since they owned and conducted a lucrative bail bond business before the statute was passed, the enactment of the statute and the order of the commissioner herein deprived them of their property without due process of law. But this is not so. The fact that the petitioners enjoyed for many years the unregulated right to conduct a bail bond business would in no wise prevent the legislature from enacting a statute immediately effective as to them provided their business be one that is subject to reasonable regulation under the police power of the state. As above stated the business of the petitioners is of such a nature that the requirement of a permit to conduct the business only upon a showing of fitness is unquestionably a reasonable one. The enactment operated immediately upon their status as bail bond brokers. From that time forward the conduct of their business was unlawful except under the conditions imposed and which they have been unable to meet. The enactment of reasonable regulations under the police power results in no deprivation of property without due process of law. The fact that a valuable business was built up without such regulation is no obstacle in the way of proper regulatory legislation immediately effective on all engaged in the theretofore unregulated business. Said legislation does not invade any constitutional right.

[24] It is insisted that the bail bond statute fails to provide for notice and a hearing; that since this is so the statute is invalid, and that therefore the hearing conducted by the Commissioner was entirely ineffectual to afford due process. The answer is that the notice and hearing which it is insisted the statute fails to provide for could in any event be only such notice and hearing as would afford due process when it is contemplated that some constitutional right is claimed to be invaded. Here, the hearing was not for the purpose of affording the petitioners an opportunity to resist an invasion of a constitutional right but was for the purpose of enabling the commissioner fairly and intelligently to determine whether a right should be granted to the petitioners, namely, a right to engage in a business the conduct of which, without a permit, was unlawful.

[25, 26] Nor did the order of the commissioner denying the permit deprive the petitioners of their property without due process. True, the statute had the effect of terminating their right to do business without a permit, but owing to the nature of the business, the legislature had the right to so terminate it conditionally, under its constitutional power to regulate such business. "Where the purpose of the statute is to protect the public from unfit persons, it is constitutional, although it disqualifies a person, by reason of past acts, from continuing in the practice of his profession or from remaining in his business." 12 Corpus Juris., p. 1106, sec. 815, and cases there cited.

Since the argument in this proceeding, and on March 16, 1939, this court decided the case of Drummey v. State Board of Funeral Directors and Embalmers, 87 P.2d 848. In a brief filed after the decision in that case the petitioners insist that the former and well-established rule with reference to the control by the courts of the discretionary power of an administrative officer has been so modified by that decision as in effect to require this court to weigh the evidence, judge of the credibility of the witnesses, exercise an independent judgment on the evidence and render its decision accordingly. In other words it is contended that under the ruling in the Drummey case this court should, in this mandamus proceeding, substitute its discretion for that of the commissioner and thus to that extent take over the administrative functions of the commissioner.

From a reading of the Drummey case it is obvious that the holding therein authorized an extension of the traditional functions of a proceeding in mandamus in the superior court. It is noted that the petitioners in that case were possessed of licenses to engage in the business of funeral directors and embalmers, which were recognized to be valuable property rights. The state board, respondent in that proceeding, had ordered the licenses of the petitioners suspended for alleged unlawful soliciting of dead bodies. It was held that the superior court in such a proceeding had the power to exercise an independent judgment on the facts presented to it and thus inquire into and determine the question of the lawfulness of the order of the board, and that the petitioners had the right to require that the trial court conduct what would be in substance and effect a trial de novo in the course of which the parties would not be limited to the record made before the board. The ruling in the Drummey case constitutes an exception to the general rule which is decisive of the present matter, and the occasion for establishing such an exception was brought about by recent holdings of the Supreme Court of the United States particularly in St. Joseph Stock Yards Co. v. U. S., 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033. That decision appeared to make it mandatory to afford a hearing before a court or some other duly constituted body exercising judicial functions to a party dissatisfied with the determination of a state-wide administrative board or officer when constitutional rights were involved. It was therefore considered that since numerous state-wide administrative boards and officers were of statutory creation and the jurisdiction of the superior court in such matters was within the control of the legislature under section 5 of Article VI of the Constitution, it would be competent for the legislature to provide, as it had in numerous statutes creating such administrative boards and officers, for a hearing de novo in the superior court, and that even in the absence of such a statutory provision due process required that a party aggrieved by reason of a ruling of the officer or board involving a constitutional right be accorded an opportunity to resort to a judicial tribunal for redress. The ruling in the Drummey case should be limited to the situation therein appearing, and as an exception to the general rule in mandamus proceedings in the superior court is not to be applicable otherwise. The Drummey case involved an order the effect of which, if unlawful or otherwise unjustified from a judicial viewpoint, would be to deprive the aggrieved party of a constitutional right without due process of law. To avoid this result it was held that the aggrieved party should there have the opportunity of a judicial hearing on the merits of his case.

We conclude that the petitioners herein have not made a sufficient showing to justify this court in disturbing the order of the Insurance Commissioner denying their application for a permit to conduct a bail bond business.

Accordingly the alternative writ is discharged and the peremptory writ is denied.

13 Cal.2d 702

## In re RATTRAY'S ESTATE.

**MURPHY et al. v. RENNIE et al.**
**L. A. 16529.**

Supreme Court of California.
June 27, 1939.

Rehearing Denied July 27, 1939.

**1. Husband and wife** 🔑**262(2)**

Where right of claimants to inherit depended not merely upon the fact of certain relationship to deceased spouse of decedent, but upon fact of such relationship plus fact that property claimed by them as heirs had formerly been the community property of decedent and her predeceased spouse, burden of showing such additional fact rested upon claimants.

**2. Husband and wife** 🔑**264**

Evidence that neither spouse had any property at time of marriage, that neither inherited any property during lifetime, that wife was at no time engaged in gainful employment, that when husband's employment ceased he was earning approximately $200 per month, and that both were frugal during their 22 years of married life, sustained finding that over $18,000 left by wife whose husband predeceased her was community property as regards rights of sisters and brothers of both husband and wife to the property. Probate Code, §§ 228, 229.

**3. Husband and wife** 🔑**249**

Sum of money acquired by wife from some unexplained source which could reasonably be traced as interest upon her bank deposits which were community property was "community property." Probate Code, §§ 228, 229.

[Ed. Note.—For other definitions of "Community Property," see Words & Phrases.]

**4. Statutes ⚷225**

The provisions of the Probate Code regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue must be construed together to provide a consistent scheme of distribution. Probate Code, §§ 228, 229.

**5. Statutes ⚷208**

The provisions of the Probate Code regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue were intended to be construed as inter-related and mutually dependent upon each other and furnishing by this means a consistent scheme of distribution of property falling within the purview of these provisions. Probate Code, §§ 228, 229.

**6. Husband and wife ⚷274(1)**

Under statute regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, no more solicitude should be exercised in providing that separate property should go to the relatives of predeceased spouse than should be exercised in providing that relatives of predeceased spouse should share in the community property of the spouses, since there is no logical basis for such distinction. Probate Code, §§ 228, 229.

**7. Husband and wife ⚷274(1)**

Under statute, that portion of the estate of a decedent who dies intestate without issue, which has been community property of decedent and predeceased spouse, and which has come to decedent by gift, devise, descent or bequest from predeceased spouse, or belonged or went to decedent by virtue of its community character on death of predeceased spouse, goes in equal shares to the relatives of the predeceased spouse and the relatives of the decedent as designated by statute. Probate Code, §§ 228, 229.

**8. Husband and wife ⚷274(1)**

Where husband made gift to wife of his interest in community property and predeceased wife and both died intestate and without issue, court properly distributed half of the original community property to husband's heirs and remainder to wife's heirs. Probate Code, §§ 228, 229.

EDMONDS, J., dissenting.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding in the matter of the estate of Elizabeth Rattray, also known as Lizzie M. Rattray, deceased, by Mary Ann Rennie and others, wherein the Honorable Matthew Murphy, consul of the Irish Free State, appearing for John Shea and others, filed objections to the partial distribution of the property in the deceased's estate. From a decree of partial distribution, contestant appeals.

Affirmed.

Rehearing denied; EDMONDS, J., dissenting.

Prior opinion, 82 P.2d 625.

John B. Ehlen, of San Francisco, and Lloyd R. Massey and Ralph Edgington, both of Los Angeles, for appellants.

Louis Thomsen, of Los Angeles, for respondents Mary Ann Rennie and David Rattray.

Duque & McKinley, of Los Angeles, for respondent William Rattray, as administrator of estate of decedent.

CURTIS, Justice.

This is an appeal from an order of partial distribution made and entered in the estate of Elizabeth Rattray, deceased. The contest is between the relatives of said Elizabeth Rattray and relatives of James Rattray, the predeceased husband of the said Elizabeth Rattray. By said decree of distribution, certain property in the estate of Elizabeth Rattray, deceased, was distributed in equal shares, that is to say, one-half thereof was distributed to relatives of Elizabeth Rattray, and one-half thereof to the relatives of James Rattray. The relatives of Elizabeth Rattray entitled to share in her estate are a brother and sister and the several children of a predeceased sister and two predeceased brothers. They have appealed from said order of partial distribution, and will be referred to herein as the appellants. The relatives of James Rattray, seeking to share in the distribution of the estate of Elizabeth Rattray by virtue of their relationship to her predeceased husband, are the brothers and sister of James Rattray, deceased, and will be referred to herein as respondents. The deceased, Elizabeth Rattray, will hereafter be referred to as the decedent.

The estate of Elizabeth Rattray consisted of cash in the amount of $26,890.67, some stock of little or no value, and a parcel of real estate of little value. This property, for the sake of this discussion, may be divided into two classifications: (1) Community property which came to the decedent, Elizabeth Rattray, upon the death of her husband. Said property had been devised and bequeathed to her by the last will and testament of her husband and had been inventoried and accounted for as part of his estate. (2) Property owned by decedent at her death which had not been included in the inventory of the husband's estate.

At the outset it was readily admitted by appellants that as to that portion of the estate of decedent in the first classification, that is to say, the property which had formerly been the community property of the spouses and which had come to the decedent upon the death of her husband, having been devised and bequeathed to her in his last will and testament, the respondents are entitled under the provisions of section 228 of the Probate Code to share equally with them by virtue of respondents' relationship to James Rattray, the predeceased spouse of decedent. However, as to that portion of the estate of decedent which had not been included in the inventory of the estate of her predeceased husband, and which amounted to the sum of $18,307.03, appellants object to respondents' receiving any part thereof, contending that such property was the separate property of the decedent, that as to such property section 228 of the Probate Code has no application, and they, as the sole heirs of decedent, are entitled to receive the whole thereof.

The trial court found, and made its order of distribution accordingly, that "all of the estate of Elizabeth Rattray, deceased, was community property of said decedent and her said previously deceased spouse, James Rattray, and came to Elizabeth Rattray, from James Rattray, by gift, devise and bequest", and that said respondents "constitute heirs of the within decedent under the provisions of section 228 of the Probate Code of the State of California, and are entitled to succeed to one-half of the estate of Elizabeth Rattray".

It is at once apparent that the order of distribution of the property in the first classification by the trial court was based upon the finding that the property was the community property of the spouses which had come to Elizabeth Rattray from her predeceased husband "by devise and bequest". There is no question as to the correctness of the order of distribution in so far as it relates to this property. As to the second classification of property, the order of distribution, it is apparent, was based upon the finding that the property was the community property of the spouses which had come to Elizabeth Rattray "by gift". The correctness of the conclusion of the trial court that respondents as relatives of the predeceased spouse were entitled to share in the distribution of this property depends upon the answer to two questions: Was the finding of the trial court that the property was the community property of the spouses which had come to the decedent by gift from her husband supported by the evidence? Do the provisions of section 228 of the Probate Code control the distribution of the property of a decedent dying intestate without issue who acquired said property as an inter vivos gift of community property from a predeceased spouse?

We are satisfied that the answer to both questions is in the affirmative and consequently the order of distribution of the trial court with reference to this property is correct.

[1] With reference to the money claimed by appellants to have been the separate property of the decedent, proof was offered to the probate court by appellants that at the time of the death of decedent's husband in 1930, decedent had on deposit with a bank in her own name, as shown by her bank books, the sum of $16,618.90. A property search report by a title company was also introduced by appellants which tended to show that decedent during her married life had held title in her own name to several parcels of real estate. Aside from the fact of title being held by her as her separate property, no evidence was produced to explain the source of the funds by which the property was acquired by her as her separate property. If no evidence of probative value was offered by respondents in proof of the fact that the source of this property was the community property of the spouses, respondents would necessarily fail to establish their right to

inherit by virtue of their relationship to the predeceased spouse of decedent. Since their right to inherit depended not merely upon the fact of that certain relationship, but upon the fact of such relationship plus the fact that the property claimed by them as heirs had formerly been the community property of the decedent and her predeceased spouse, the burden of showing such additional fact rested upon them. Estate of Simonton, 183 Cal. 53, 190 P. 442.

[2] The sole evidence available upon this question, and produced by respondents, was the testimony of William Rattray, a brother of the predeceased spouse. Undoubtedly the trial court, in accepting as true the testimony of said witness, had in mind his interest in the outcome, and in weighing his evidence, gave due weight to this factor. We are of the opinion that this testimony was sufficiently substantial to support the finding of the trial court with reference to the community character of this property, and the necessary inference therefrom that since all of the property had been the community property of the spouses, and the wife had no other source of income, this property of the wife had come to her as an inter vivos gift from her husband. Briefly summarized, the testimony of William Rattray was to the effect that he first met decedent two years after her marriage in 1908 to his brother, James Rattray, and that he stayed with them for some little time; and then saw them at intervals for several years; that quite often he had discussions with them relative to their financial affairs; that at the time of the marriage his brother had no property; that his sister-in-law had no property at the time of their marriage; that after their marriage she was a housewife for her husband; that shortly after the marriage his brother started to work for the Los Angeles Water Company and worked for that company for approximately twenty years; that he worked up to the position of foreman in which position he earned $200 a month; that his brother was ill for about a year prior to his death in 1930 and left the employment of the company; that his brother had never inherited anything from anybody and that he had never heard from his sister-in-law or anyone else that she had ever inherited any; that she did nothing to earn her livelihood after her husband's death but continued to be a housewife; that at the time of the husband's death they owned one piece of real property, and at different times had sold three other parcels of property; and that they were very frugal in their manner of living. This testimony, although uncorroborated, was likewise uncontradicted by any fact or circumstance which would support in the slightest degree any inference that the source of the property was not community property of the spouses. The property acquired by them totaled an amount commensurate with the income of the husband and their manner of living. The trial court was justified, therefore, in concluding that all of the property of the spouses, including the amount on deposit in the bank in the wife's name, was acquired by their joint efforts and from the frugality of the spouses during their twenty-two years of married life.

[3] With reference to the sum of $1,688.13, acquired by decedent from some unexplained source, and which goes to make up the total of $18,307.03, claimed by appellants as a part of decedent's estate wholly distributable to them, since the wife engaged in no gainful occupation subsequent to the death of her husband, this money may reasonably be traced as interest upon her bank deposits, and as such fruit of community property, must likewise be deemed to be community property. The contention of appellants' therefore, that the evidence does not support the finding of the trial court to the effect that all the property in the estate of the decedent was the community property of the spouses, and that a portion thereof came to the decedent by gift from her predeceased husband, cannot be sustained.

A more difficult problem is presented with reference to the question of whether or not the provisions of section 228 of the Probate Code control the distribution of property of a decedent dying intestate without issue who acquired said property as an inter vivos gift of community property from a predeceased spouse.

Appellants contend that the first paragraph of subdivision 8 of section 1386 of the Civil Code (which upon the adoption of the Probate Code by the legislature in 1931 was reenacted as section 228 of the Probate Code) has been construed as applying only to the community property of the spouses received by the surviving spouse "by will or inheritance or retained by virtue of its character as community property", and as having no application to community property which had come to the decedent during the lifetime of the spouses as an inter vivos gift from the predeceased spouse, and hence section 228 of the Probate Code must necessarily receive the same construction. Estate of McCauley, 138 Cal. 546, 71 P. 458; Estate of Simonton, 183 Cal. 53, 190 P. 442, 444. It cannot be gainsaid that there is a great deal of force in this argument.

Respondents contend that section 228 of the Probate Code and section 229 of the Probate Code should be construed together, as were the two paragraphs of subdivision 8 of section 1386, of the Civil Code upon which the above sections of the Probate Code were based, and as so construed, by an enlargement of the scope of section 229, the scope of section 228 has likewise been enlarged to include the community property of the spouses which came to the decedent by an inter vivos gift from the predeceased spouse.

[4] We are of the opinion that a study of the history of these two sections since the original enactment of subdivision 8 (mistakenly numbered subdivision 9) of section 1386 of the Civil Code in 1880, and an understanding of the obvious purpose behind the enactment of these two provisions, controlling, in the absence of issue or testamentary disposition, the descent and distribution of property of a decedent which had been either the community property of the spouses or the separate property of a predeceased spouse, compels the conclusion that section 228 and section 229 of the Probate Code should be read and construed together.

At the time of its enactment in 1880, subdivision 9 of section 1386 of the Civil Code (later renumbered correctly, subdivision 8) read as follows: "If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brothers or sisters of such deceased spouse, by right of representation." In other words, this subdivision was a mere last resort to prevent property escheating to the state in the event the decedent left no kindred. See Article, Rules of Descent under Probate Code sections 228 and 229, by W. W. Ferrier, Jr., in 25 California Law Review, p. 261. (Apparently by an oversight issue of the predeceased spouse by a former marriage were not included among the designated relatives entitled to inherit.) Under the section as it then read, the question of the scope of said provision relative to community property was first presented in 1903 for determination. The court in Estate of McCauley, 138 Cal. 546, 71 P. 458, 459, held that the community property referred to in subdivision 9 of section 1386 of the Civil Code as distributable to the relatives of a predeceased spouse of a decedent leaving no kindred, must have been property which came to the decedent on the death of the predeceased spouse and that said section had no applicability to the property which had been the community property of the spouses and had come to the decedent as a gift from such predeceased spouse. In that case a widow who had received the bulk of her estate as an inter vivos gift from her husband died testate leaving no kindred. She bequeathed to nine individuals and five charitable corporations a money legacy. The legatees, other than the charitable corporations, sought to have the legacies to said corporations reduced to one-third of the distributable estate by reason of the provisions of section 1313 of the Civil Code which provided that charitable corporations could not take devises or bequests by will which should collectively exceed one-third of the estate of the testator leaving "legal heirs". Appellants argued that two nieces of the predeceased husband of decedent (not mentioned in decedent's will) were "legal heirs" of the decedent by virtue of subdivision 9 of section 1386 of the Civil Code, and that if any of decedent's property of which she died seized had been common property at any time before the death of her spouse, it must be regarded as community property regardless of any gift to her by her husband in his lifetime, and as her husband left legal heirs, and she left no kindred, such property must be taken into account in determining the "one-third of the estate of the testator leaving legal heirs [Section 1313, Civil Code]". The court was impressed by the fact that such a construction would greatly circumscribe the right of the wife of absolute testamentary disposition, if she left no kindred, and held that the nieces of the predeceased husband were legal heirs of the decedent with reference only to the common property "which remained undisposed of" by the predeceased husband at his death. It is quite apparent that the term, "common property of such decedent, and * * * her deceased spouse, while such spouse was living" as set forth in subdivision 9 of section 1386 of the Civil Code, could reasonably have been interpreted to include all property in the estate of decedent which had ever been the community property of the spouses. There can be little doubt that the particular factual situation presented by that case was largely responsible for the narrow limitation placed upon the scope of the term "common property of the decedent and a predeceased spouse, while such spouse was living" in that case. Thereafter in 1905, St.1905, p. 608, the subdivision was renumbered 8 and enlarged to apply not only to community property of the decedent and the predeceased spouse, but to include property which had been the separate property of the predeceased spouse. It also corrected the apparent oversight with reference to the issue of the predeceased spouse, for by said amendment, said issue was included and given preference over the other designated relatives. A further and most material change was made at this time which transformed the subdivision from a provision to prevent escheat to the state to a provision setting up a wholly new rule of descent. This was accomplished by substituting the word, "issue" in the place of the word, "kindred", so that the section instead of applying only in the event the decedent left no kindred applied whenever the decedent died intestate leaving no issue. The subdivision as then enacted read as follows: "If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse and the descendants thereof, and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation." It will be noted that this provision actually took all the property which had been community property of the decedent and a predeceased spouse away from such close relatives of the decedent as his own parents, brothers, and sisters, and gave it to the same relatives of the predeceased spouse. This only lasted until the next legislature in 1907, St.1907, p. 567, when it was amended to provide for an equal division between certain designated relatives of the decedent and of the predeceased spouse of that property which had previously been the community property of the two spouses. At this time, the subdivision was divided into two paragraphs. The first paragraph was concerned with the community property of the spouses and contained no reference as to the manner of acquisition of the property by the surviving spouse. The second paragraph was concerned with property which had been the separate property of the predeceased spouse and contained the provision (possibly to conform to the judicial construction with reference to community property) that it applied to separate property of the deceased spouse which had come to the decedent "by descent, devise or bequest". In 1920, in Estate of Simonton, 183 Cal. 53, 190 P. 442, 443, upon a final distribution of the estate of a widow, who, after making certain specific bequests, had left the residue of her estate to her "heirs at law as provided by the laws of succession of the state of California", a contest arose between the next of kin of decedent and the descendants of her predeceased husband. Issue was made as to what property had been formerly community property and should go to the descendants of the predeceased husband and what property was not of this character and should, therefore, go to the decedent's branch of the family. The court, following and relying upon the decision in Estate of McCauley, supra, held that subdivision 8 of section 1386 of the Civil Code applied only to property received by will or inheritance or retained by virtue of its community character. In arriving at this conclusion, the court in addition to relying on Estate of McCauley, supra, justified its decision by calling attention to the fact that the language of the second paragraph of the subdivision which dealt with property which was the separate property of the predeceased spouse, contained specific language as to how the property must come to decedent in order for the provision to apply, namely, "by descent, devise or bequest". The court argued that an equivalent provision in the case of community property would be one limited to property received or retained by the survivor of the community either by will or by inheritance or by virtue of its character as community property, and that as there was a fair presumption that the two provisions were intended to be equivalent, the provision relative to community property should receive a construction similar to that required by the plain language of the equivalent section referring to separate property. In 1930, the phrase, "if the deceased [was] a widow, or a widower" was interpreted by this court in Estate of McArthur, 210 Cal. 439, 292 P. 469, 470, 72 A.L.R. 1318, to include a person who had remarried after the death of a former spouse and had died leaving the second spouse surviving. The next year the legislature enacted in its entirety the Probate Code which had been prepared and proposed by the code commission, appointed pursuant to chapter 750, p. 1427, Statutes of 1929, to enter upon a revision, compilation and codification of the laws of the state. The first paragraph of subdivision 8 of section 1386 of the Civil Code was reenacted in almost identical language as section 228 of the Probate Code with the exception that the words, "If the deceased is a widow, or widower" were deleted as being meaningless since the decision in the Estate of McArthur, supra, and the words, "was common property of such decedent, and his or her deceased spouse, while such spouse was living", was changed to, "was community property of the decedent and a previously deceased spouse". The second paragraph of said subdivision 8 of section 1386 of the Civil Code was reenacted as section 229 of the Probate Code, but the word, "gift" was added to the phrase, "descent, devise, or bequest" in order, as stated by the code commission, "to make the section logically complete". Obviously, the addition of the word, "gift" enlarged considerably the scope of this provision. The two code sections as they now exist, and as they existed at the time of the death of the decedent read as follows:

"§ 228. *No issue. Community property.* If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and to their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of such deceased spouse and to their descendants by right of representation."

"§ 229. *No issue. Separate property of deceased spouse.* If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation."

It is apparent from the history of these code provisions and the various changes therein that ever since the amendment in 1905, wherein the origin or source of the property was first set up as one of the determining factors in the descent and distribution of the estate of a decedent dying intestate without issue, that there has been a consistent attempt to work out a reasonable, consistent scheme of distribution wherein upon the death of a decedent intestate without issue, instead of the whole property going to the relatives of the last surviving spouse, the property should go back to the relatives of the spouse from which title was derived. The scheme in general, as was fair and reasonable, provided that the separate property of a predeceased spouse should go back in its entirety to the relatives of said predeceased spouse, and that the community property of the spouses should be shared equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition. Estate of Brady, 171 Cal. 1, 151 P. 275; Estate of McArthur, supra; Estate of Putnam, 219 Cal. 608, 28 P.2d 27. It will be noted that the provisions relative to the separate property of the predeceased spouse and relative to the community property of the spouses were contained in one subdivision of one section of the code (subd. 8 of sec. 1386, Civ.Code) and were intended to furnish one general plan of distribution based upon the same underlying fundamental principle, that the origin or source of the property should determine its distribution. As before noted, in Estate of Simonton, supra, the court in arriving at its conclusion with reference to the community property of the spouses based, in part, its reasoning upon the phraseology of the paragraph of the subdivision relating to the separate property of the predeceased spouse, saying, "There is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists".

[5] Logically, therefore, it seems that the only correct conclusion is that the two sections should be construed together. If they are construed together, a consistent scheme of distribution is provided. If they are construed separately an inconsistent scheme of distribution is provided for separate and community property which is not based upon reason or justice and has no relation to the obvious purpose which motivated the enactment of said provisions. If the sections are not construed together the result will be that the separate property of a predeceased spouse which has by inter vivos gift been converted into the separate property of the other spouse will go in its entirety to the relatives of the predeceased spouse, but the community property which has been converted by the predeceased spouse by inter vivos gift into the separate property of the other spouse will go wholly to the relatives of the decedent to the entire exclusion of the relatives of the predeceased spouse. In other words, the rational basis of the system of distribution is destroyed and a mere, arbitrary, inconsistent rule of succession substituted.

While the code commissioners disclaimed any purpose of making any substantial changes in the law as it existed prior to the proposed Probate Code, they did make a far-reaching change by the addition of the word, "gift" to section 229 "to make [it] logically complete". It would seem self-contradictory to suppose that in adding the word, "gift" to section 229, which has application to separate property "to make the section logically complete" they intentionally planned to destroy the harmony and consistency of the rule of distribution which had theretofore applied alike to separate and community property. In view of the fact that the two sections had theretofore been construed as being mutually dependent on each other, it seems more reasonable to conclude that the code commissioners in proposing the enactment of the two sections of the Probate Code, and the legislature in enacting them, intended that these provisions should in the future, as they had in the past, be construed as inter-related and mutually dependent upon each other and furnishing by this means a consistent scheme of distribution of property falling within the purview of these provisions.

[6] Appellants argue that more solicitude should be exercised in providing that separate property should go to the relatives of the predeceased spouse than should be exercised in providing that the relatives of the predeceased spouse should share in the community property of the spouses, but we are unable to perceive any logical basis of such distinction between the two classes of property with reference to the rights of succession under the circumstances which entitle the designated relatives in either event to inherit. And any argument based upon a claim that there is any real basis of distinction between the two classes of property must, we think, be held to be untenable.

It is true that in the case of Estate of Miller, 23 Cal.App.2d 16, 18, 71 P.2d 1117, in which a hearing was denied by this court, it was held that where the membership fees and dues in the Widows' and Orphans' Aid Association had been paid for out of community funds of a husband and wife, and the constitution of the association provided that the widow should be paid the sum of $2,500 if no person had been designated by the insured as beneficiary, and no beneficiary had been so designated, proceeds of the policy were properly payable to the administrator of the wife's estate (she having died within two weeks of his decease) upon the theory that the payment of the membership fees and dues was an inchoate gift by the husband of community property which became complete upon his death, and that section 228 of the Probate Code did not apply to this community property which the husband by gift had converted into his wife's separate property. While it is true that this is a construction of section 228 of the Probate Code subsequent to its enactment in 1931, and the decision therein is necessarily predicated upon the conclusion that section 228 does not apply to community property of spouses which by inter vivos gift has become the separate property of the surviving spouse, it is apparent from the record in that case that the efforts of counsel for the heirs of the predeceased husband were directed primarily to convincing the court that the property had not become the separate property of the wife by gift. but had remained community property which came to her upon the death of her husband by virtue of its community character. However, upon more careful analysis of the two sections of the Probate Code, section 228 and section 229, we are convinced that the holding in that case was in error. In Estate of Lissner, 27 Cal.App.2d 570, 81 P.2d 448, the court followed the ruling in Estate of Miller, supra, with reference to a part of the property in controversy which consisted of the proceeds of a life insurance policy in which the wife had been named as beneficiary. At the oral argument it was conceded by respondents that appellants were entitled to succeed to such proceeds in accordance with the holding in the Estate of Miller, supra, and the court so held. In the petition for a hearing to this court, this holding was not mentioned nor questioned. While it is to be regretted that a hearing was not granted by this court of the petition in Estate of Miller, supra, we do not believe that our failure to grant it, should preclude us from arriving at what we consider a correct conclusion when the matter is directly presented to us in the instant case.

[7, 8] As we read Section 228 of the Probate Code it provides that that portion of the estate of a decedent who dies intestate without issue, which has been the community property of said decedent and a predeceased spouse, which has come to said decedent by gift, devise, descent or bequest from such predeceased spouse, or belonged or went to the decedent by virtue of its community character on the death of such predeceased spouse, goes in equal shares to the relatives of the predeceased spouse and the relatives of the decedent designated in said section.

The order of the trial court being in conformance with said construction of Section 228 of the Probate Code is affirmed.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; SEAWELL, J.

EDMONDS, Justice (dissenting).

I cannot agree with the construction placed upon Section 228 of the Probate Code by the decision in this case. In my opinion, it is not in harmony with either the letter or the spirit of the law.

As early as 1880 the legislature of California provided that if a widow or widower died intestate leaving no kindred, any portion of his or her estate which was common property of such decedent and a deceased spouse, while such spouse was living, should go to the heirs of the predeceased spouse. Sec. 1386, Civ.Code. Undoubtedly, the legislative purpose of this enactment was to allow the relatives of the one whose death terminated the community to inherit the property accumulated by the spouses rather than to have it escheat to the state.

Not until 1903 was this court called upon to determine the meaning of the section. At that time, the appellants in Estate of McCauley, 138 Cal. 546, 71 P. 458, contended that if any of the decedent's cash and real estate was common property at any time before the death of her spouse, it must be distributed as required by the statute. Under that construction community property which Mr. McCauley had given to his wife before his death would pass to his heirs. However, the court adopted "the more reasonable construction", construing the words "while such spouse was living" to mean "that the common property referred to must be such as remains undisposed of by such spouse at his or her death." The statute cannot mean, said the court, that if that portion of an estate in controversy "happened to be at some time 'common property of such decedent, and his or her deceased spouse,' but had long before the death of such spouse been conveyed by him or her to decedent, that in case of the decedent's intestacy the property would go to the deceased spouse's heirs".

This decision definitely and positively established the rule that the statute as then in effect did not include community property which had been the subject of an inter vivos gift. Seventeen years later and after the legislature had amended the code section by adding a rule of succession for any portion of an estate which was separate property of a deceased spouse, while living, "and came to such decedent from such spouse by descent, devise or bequest", the same question again came before the court and it followed the former case. In construing the provision defining the community property which could be succeeded to under the circumstances mentioned in the statute, it said: "Literally, this would include any property which had once been community property, no matter if it were not such at the time of the husband's death, as, for example, when the husband had in his lifetime given it to his wife for her separate property. But such a meaning is clearly not what was intended, and it has already been held that it is not the true meaning." Estate of Simonton, 183 Cal. 53, 57, 190 P. 442, 444.

Here was a second positive and definite pronouncement of the court, based upon the reasoning of the former decision. But as another ground for its conclusions, the court considered provisions concerning separate property which were not a part of the statute when the McCauley case was decided. Because, said the court, the legislature provided that separate property which came to the decedent, the surviving spouse, by descent, devise or bequest shall go to the latter's relatives, "there is a fair presumption that upon this point the provisions with regard to community and separate property were intended to be equivalent, for no reason for a difference exists".

However, the statute concerning community property was enacted in 1880 and its meaning had been construed at a time when separate property was not included in it and there was, of course, no specification concerning the manner in which a surviving spouse succeeded to separate property. Therefore, the provisions of the statute concerning separate property, added many years after the decision which construed the original statute, could not properly have been referred to for the purpose of ascertaining the legislative intent in regard to community property. In Estate of McCauley, supra, where the statute first came before the court, its interpretation of the words "common property of such decedent, and his or her deceased spouse, while such spouse was living", was reached upon a consideration of their meaning in the light of the purpose of the statute in which they were used and in consonance with fundamental principles of statutory construction.

The true situation then after the legislature added the provision concerning separate property, was as follows: By judicial construction of the code section, the community property which passed under its provisions was that which was such at the time of the death of the predeceased spouse and did not include any which had been the subject of an inter vivos gift; by its express terms the separate property was that which had come to the decedent by "descent, devise or bequest".

In 1931, when the Probate Code was adopted, that part of section 1386 of the Civil Code relating to community property became section 228 of the new code; the portion concerning separate property was enacted as the following section. In rewriting the former statute, in addition to some slight textual changes the word "gift" was added to section 229 so that the separate property which may be claimed under it by succession now includes that which came to the decedent by "gift, descent, devise or bequest". But substantially the same words construed in Estate of McCauley, supra, and Estate of Simonton, supra, have been continued through all the revisions of the section, and in considering the application of section 228 of the Probate Code, the same statute which is now in question, to community property taken in the name of a husband and wife as joint tenants, this court again followed the rule of the earlier decisions. In re Kessler, 217 Cal. 32, 17 P.2d 117, 118. It held that under the joint tenancy the interest of each spouse was separate property and that the wife succeeded to the husband's separate interest by right of survivorship; hence "upon her death, her heirs alone were entitled to share therein".

In three cases then, dating from 1903, the statute in its different forms has been considered by the Supreme Court and the same construction placed upon it by each decision. Also, they have recently been followed by the district court of appeal in Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117, wherein it was held that "section 228 of the Probate Code is not applicable to community property which the husband, by gift, has converted into his wife's separate property".

The present decision holds that because the legislature wrote the word "gift" into the statute concerning separate property, this court must write the same word into the law relating to community property. In my judgment this violates all rules of statutory construction and is entirely illogical.

At the time the Probate Code was adopted, the rule stated in the McCauley case had stood for 28 years as the law of California. There are many reasons why community property which has been the subject of an inter vivos gift should not be included among that which passes under the statute of succession; those reasons do not apply to separate property. This was alluded to in Estate of Simonton, supra, where the court said that to construe the statute concerning community property as including a gift of it would "place the relatives of a predeceased spouse in a more favorable position with regard to community property than with regard to such spouse's separate property, when, if any distinction were to be made, if would naturally be just the contrary".

The legislation here considered represents the old common law rule as to the descent of ancestral property, which allowed only those of the blood of the first purchaser by whom the land was brought into the family to inherit it. However, at common law and in states which have recognized the doctrine of ancestral estates, a sale or exchange of land extinguishes its ancestral character. Also, the doctrine has not generally been applied to personal property.

To construe section 228 of the Probate Code as including property which has been the subject of an inter vivos gift is directly contrary to the principles upon which the doctrine of community property rests. Since 1927, the law has expressly provided that "the respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal". (Sec. 161a, Civ.Code.) Community property is that which has been acquired after marriage by either husband or wife or both, except that acquired by gift, bequest, devise, or descent, and is frequently the result of the labors of each. Therefore, in consonance with principles of natural justice, not only is the wife's interest in the community property recognized as being "present, existing and equal", but since the early years of the state either husband or wife could make a gift of his or her interest in it to the other, and thereafter it was the separate property of the donee. In other words, a husband in recognition of the efforts of his wife in accumulating their community property, or for any other reason, may make a valid gift of it to her and from the date of that gift it becomes her separate property. Yet by the present decision, the same property, upon her death, must be considered to be community property.

There is still another reason why, in my opinion, the construction stated by the present decision is incorrect. Although the code commission in its report to the Governor and the legislature submitting the proposed Probate Code called attention to material changes in the law of succession which would follow its enactment, there is no suggestion that it would result in a different construction of the language relating to community property from that laid down in Estate of McCauley, supra. It, therefore, seems reasonable that neither the commission nor the legislature intended to include in the term community property as used in section 228, any which had become the separate property of one of the spouses by gift during the marriage relation.

For these reasons, I believe that the decree of distribution should be reversed.

13 Cal.2d 721

## In re SLACK'S ESTATE.

## SPARKS et al. v. RENWICK et al.

S. F. 16001.

Supreme Court of California.
June 27, 1939.

Rehearing Denied July 27, 1939.

**1. Deeds 🔑194(2)**

A presumption of valid delivery arises from the possession of a deed by a grantee.

**2. Husband and wife 🔑266**

Where undivided one-half interest in realty was conveyed each to husband and wife by deed and when husband was in fear of approaching death husband told wife that if anything should happen to him wife should record deed executed eight years prior thereto by husband conveying his half interest to wife, such instruction did not constitute a conditional delivery and did not affect the conveyance of the interest covered by the instrument, as respects rights of wife's heirs to realty so conveyed, notwithstanding testimony that spouses executed mutual deed in mistaken belief that they could thereby avoid probate. Probate Code, §§ 228, 229.

**3. Husband and wife ⚷249**

Where husband and wife each acquired an undivided half interest in realty by deed, wife by virtue of deed and statutory presumption arising at time of acquisition of the property acquired an undivided one-half interest in the property. Civ.Code, § 164.

**4. Husband and wife ⚷266**

The taking of property by the spouses by a deed under which wife acquired undivided one-half interest in realty resulted in conversion of one-half of community property into separate property of wife and constituted an inter vivos gift by the husband of community property. Civ.Code, § 164.

**5. Husband and wife ⚷266**

Where undivided one-half interest in realty was conveyed each to husband and wife by deed, and husband executed absolute conveyance of his interest to wife, wife became sole and separate owner of undivided one-half interest which had theretofore been held in the name of the husband as community property of the spouses.

**6. Husband and wife ⚷274(1)**

The provision of the Probate Code that where decedent leaves no issue, one-half of community property goes in equal shares to decedent's heirs and one-half to heirs of decedent's predeceased spouse applies to community property which has come to the surviving spouse by inter vivos gift from predeceased spouse. Probate Code, § 228.

**7. Husband and wife ⚷274(1)**

Where undivided one-half interest in realty was conveyed each to husband and wife by deed and husband executed absolute conveyance of his interest to wife and husband predeceased wife, undivided one-half of the estate descended to the heirs of the wife and an undivided one-half to the heirs of the predeceased husband. Probate Code, § 228.

**8. Husband and wife ⚷274(1)**

Where undivided one-half interest in realty was conveyed each to husband and wife by deed and husband executed absolute conveyance of his interest to wife, if deed of gift from husband to wife was one of two mutual deeds and therefore ineffective to pass title to wife, heirs of husband who predeceased wife would still be entitled to share equally with the heirs of wife, since the half interest in the community property which existed at the time of the death of the husband belonged to and went to wife by virtue of its community character upon his death, and its distribution would be controlled by statute. Probate Code, § 228.

**9. Husband and wife ⚷274(1)**

A sum of money concededly separate property of wife was distributable to the heirs of the wife alone. Probate Code, § 225.

EDMONDS, J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Cora C. Slack, also known as Coreen C. Slack, deceased, by Josephine A. Sparks and others against Jennie B. Renwick and others to determine heirship. The probate court decreed that all property involved was community property, and Josephine A. Sparks and others appeal.

Affirmed in part and reversed in part with directions.

Rehearing denied; EDMONDS, J., dissenting.

Prior opinion, 82 P.2d 701.

Charles C. Boynton, of San Francisco, for appellants.

W. A. Brandenburger, of Sacramento, for respondents.

CURTIS, Justice.

This is an appeal from a decree determining heirship in a contest between the relatives of the decedent wife and the relatives of the predeceased husband. Decedent, Cora C. Slack, died on March 1, 1934, intestate, and without issue, and leaving neither father nor mother surviving. The predeceased husband, Charles A. Slack, had died on November 27, 1931, intestate, and without issue, and leaving neither father nor mother surviving. Appellants are the two sisters, seven nieces and two grandnieces of the decedent wife. Respondents are the two nieces and one nephew of the predeceased husband.

The proceedings were instituted by the relatives of the decedent wife by the filing of a petition to determine heirship. The petitioners claimed in said petition to be entitled as heirs of the decedent to have the whole of the estate of the decedent distributed to them by reason of the fact that at the time of the death of the predeceased spouse all of the property which had been acquired by the spouses out of community funds had, prior to the death of the husband, been transmuted into the separate property of the wife. Respondents, answering said petition, claimed that they were entitled, under Section 229 of the Probate Code, to have distributed to them that portion of the estate of the decedent which had been the separate property of the predeceased husband and had come to decedent from him by gift, descent, devise and bequest, and that they were entitled under the provisions of Section 228 of the Probate Code, to share equally with the relatives of decedent in the distribution of the estate of decedent which had been the community property of the decedent and her predeceased husband. The property in the estate of decedent consisted of an apartment house on Baker street in San Francisco, appraised at $5,750, and a small amount of personal property, including a small amount of cash.

The finding of the trial court was: "That decedent and her predeceased husband were married June 27th, 1894; that neither of them brought any separate property into the community; that the property and estate accumulated by said spouses during their lifetime was the community property of said spouses and now constitutes the estate of Cora C. Slack, the decedent; that said estate consists of the personal property now in the hands of the administratrix herein and that certain real property consisting of a certain apartment house and furnishings located at 1598 Hayes Street in the City and County of San Francisco." The court likewise found that the entire residue of the estate of said decedent consisting of the aforesaid real and personal property descends as follows: "An undivided one-half thereof to the heirs of Cora C. Slack, the decedent, and an undivided one-half thereof to the heirs of Charles A. Slack, predeceased husband of said decedent."

The main controversy between the two groups of contestants revolved around the question as to who was entitled to inherit the apartment house. We are satisfied, as to that portion of the decree determining that each group was entitled to inherit equally, that the trial court reached the correct conclusion, and that the decree in so far as it affects the apartment house must be affirmed.

The evidence adduced at the hearing amply supported the finding of the trial court that neither of the spouses brought any separate property in to the community and that the property and estate accumulated by said spouses during their lifetime were community property. At the time of the marriage of the spouses in 1894, the decedent was a dressmaker and her husband was clerking in a grocery store at the corner of Post and Mason streets in San Francisco. Respondents offered the testimony of a niece of Mr. Slack's to prove that prior to the marriage, Mr. Slack had received money from his mother with which to set up a grocery store of his own, and it was this witness' recollection that at the time of his marriage he was already established as proprietor in his own grocery store. However, this witness' memory for dates was very hazy and several witnesses who had been close friends of Mr. and Mrs. Slack both prior to their marriage and for many years thereafter, testified that it was two or three years subsequent to his marriage that Mr. Slack went into the grocery business for himself and that because of his honesty and reliability he was able to obtain credit from the wholesalers for his goods and thus enabled to establish his business "on a shoestring". The testimony of each of these witnesses corroborated the testimony of other witnesses to the same effect, and produced conviction that the property acquired by the spouses had been accumulated by their joint efforts during their married life.

It is to be noted that the finding of the trial court is simply to the effect "that the property and estates of the spouses accumulated during their lifetime was the community property of the spouses and now constitutes the estate of Cora C. Slack, the decedent". There is no specific finding as to how the property, or any part thereof, came into the sole and separate ownership of Cora C. Slack, whether it was by gift, devise, descent, or bequest, by right of survivorship, or whether by virtue of its community character a part belonged to her and a part came to her as her separate property upon her husband's death.

[1] With reference to the apartment house property, appellants introduced a title insurance report in evidence showing the following chain of title: (1) Deed

from Ethel R. McCormick to Chas. A. and Cora C. Slack, recorded June 20, 1917. (2) Deed from Charles A. Slack and Cora C. Slack to Title Insurance and Guaranty Company, recorded November 22, 1917. (3) Deed from Title Insurance and Guaranty Company to Chas. A. and Cora C. Slack, recorded December 5, 1917. (4) Gift deed from Charles A. Slack to Cora C. Slack, recorded November 27, 1931. The original deed from Ethel R. McCormick to Chas. A. and Cora C. Slack, the deed from the Title Insurance and Guaranty Company, and the gift deed from Charles A. Slack to Cora C. Slack were also introduced in evidence. The date of the execution of the gift deed from Charles A. Slack to Cora C. Slack was March 14, 1923. With reference to the deed of gift from Charles Slack to his wife, Mr. Sparks, the brother-in-law of Cora C. Slack, testified that on November 27, 1931, the day following the death of Charles Slack, Mrs. Slack had handed him the deed and asked him to have it recorded, stating to him that on the day after she and her husband had returned from a trip to Oroville in June of that year, where they had gone to purchase a burial lot, her husband had handed her the deed, saying to her, "If anything happens to me, you record it—have it recorded." It is true that the niece of Mr. Slack testified that her aunt, Mrs. Slack, had told her that she and Mr. Slack had executed mutual deeds to each other so that the one who survived would obtain the property without probate and if this was a fact, the deeds whereby each conveyed his or her interest to the other would not affect the title to the property, but this testimony standing alone, is not sufficient to overcome the presumption of valid delivery which arises from the possession of a deed by a grantee. Not only is there in the record the testimony of the positive statement of Mrs. Slack that Mr. Slack handed her the deed, but the circumstances surrounding the trip to Oroville which was to purchase a burial lot by reason of the fact that Mr. Slack had been suffering from heart attacks of increasing severity, strongly supports the truth of Mrs. Slack's statement. No deed from Mrs. Slack to Mr. Slack was found or produced to substantiate the theory of mutual deeds. And it may well be that if the spouses had in fact executed mutual deeds in the mistaken belief that they could thereby avoid probate, due to the poor health of Mr. Slack, the deed from the wife had been destroyed prior to the delivery to her of the deed from her husband. The circumstance of Mr. Slack's ill health likewise disproves, we think, any claim that the delivery of the deed was only a qualified delivery by virtue of the fact that in handing the deed to her he said, "If anything happens to me, you record it—have it recorded."

[2-5] It is apparent, therefore, from the record, that the wife acquired as her separate property, the property which had previously been the community property of the spouses, by inter vivos gifts from her husband. She acquired an undivided one-half interest therein by virtue of the original deed from the third party to herself and husband. This is necessarily so by virtue of the form of the deed and the presumption arising from section 164 of the Civil Code at the time of the acquisition of the property. Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015; Estate of Regnart, 102 Cal.App. 643, 283 P. 860. The taking of the property by the spouses by such deed which resulted in a conversion of one-half of the community property into the separate property of the wife constituted an inter vivos gift by the husband of community property. Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Estate of Regnart, supra. The deed from the spouses to the Title Insurance and Guaranty Company had no effect on the title since the property was redeeded almost immediately by the Title Insurance and Guaranty Company to the spouses. By the deed of gift from her husband executed on March 14, 1923, delivered on June 13, 1931, and recorded November 27, 1931, Cora C. Slack became the sole and separate owner of the remaining undivided one-half interest which had theretofore been held in the name of Charles C. Slack as the community property of the spouses. Dunn v. Mullan, supra.

[6, 7] Section 228 of the Probate Code provides that, "If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the

decedent and to their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of such deceased spouse and to their descendants by right of representation." This section has been recently construed to apply to community property which had come to the surviving spouse by inter vivos gift from the predeceased spouse. Estate of Rattray, Cal.Sup., 91 P.2d 1042, this day decided. This being so, the decree of the trial court finding that the two groups of heirs should share equally in the real property is correct.

[8] It may be remarked that even if it be conceded that the deed of gift from Charles A. Slack to his wife was one of two mutual deeds and therefore ineffective to pass title to his wife, under the provisions of the above code section, the respondents would be entitled to share equally with the appellants, for in that event, the one-half interest in the community property which existed at the time of the death of Charles A. Slack, belonged to and went to his wife by virtue of its community character upon his death, and its distribution is controlled by the aforesaid provisions of section 228 of the Probate Code. Estate of Simonton, 183 Cal. 53, 190 P. 442.

[9] The apartment house and furnishings constitute the entire estate left by the decedent except the sum of $1165.98 in money. This sum of money, it is conceded by respondents, was the separate property of the decedent and under section 225 of the Probate Code, the appellants were entitled to have distributed to them the whole amount instead of one-half thereof, as provided by the decree appealed from.

The decree of the trial court in so far as it applies to the real property, and to any personal property, except said sum of $1165.98, is affirmed.

As to said sum of $1165.98, said decree is reversed with directions to the trial court to modify its decree and to distribute to appellants the whole of said sum of $1165.98, after deducting from said sum that portion of the expenses of administration, including funeral expenses, expenses of last sickness, and the amount expended in payment of claims against said estate, which said sum of $1165.98 bears to the total appraised value of said estate.

Costs to be borne by each party.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; SEAWELL, J.

EDMONDS, Justice (dissenting in part).

I concur in the conclusion reached by my associates that Cora C. Slack acquired by inter vivos gift from her husband and as her separate property the real estate which had theretofore been their community property, but I disagree with the construction placed upon section 228 of the Probate Code for the reasons stated by me in Estate of Rattray, Cal.Sup., 91 P.2d 1042. I believe, therefore, that the decree appealed from should be reversed with directions to distribute the entire estate of Mrs. Slack as her separate property in accordance with the provisions of section 229 of the Probate Code.

**Ralph W. EVANS, Building and Loan Commissioner, Petitioner, v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO and James G. Conlan, Judge, Respondents.** *

**S. F. 16245.**

**Supreme Court of California.**

**June 29, 1939.**

In Bank. Application for writ of mandate.

Application for prohibition and mandate denied in chambers, No Opinion.

Rehearing granted.

Dissenting opinion from order granting rehearing.

Wood, Crump & Rogers, of Los Angeles, and Cushing & Cushing and Bartley C. Crum, all of San Francisco, for petitioner.

Breed, Burpee & Robinson, of Oakland, amici curiæ for California Real Estate

---

*For subsequent opinion see 96 P.2d 107.

Ass'n and San Francisco Real Estate Board.

Walter H. Linforth and William M. Cannon, both of San Francisco, amici curiæ for Edward E. Cleese et al., certificate holders.

Everett C. McKeage and Richard M. Leonard, both of San Francisco, amici curiæ for E. W. Wilson, as superintendent of banks.

EDMONDS and HOUSER, Justices (dissenting).

The petition filed on May 29th (S. F. No. 16245) sought an alternative writ of prohibition or mandamus to prohibit the Superior Court from issuing any injunction restraining the Building and Loan Commissioner from (1) employing special counsel, or any attorneys other than the attorney-general, or (2) from paying from the funds of the Pacific States Savings and Loan Association for the services of appraisers, certified public accountants, special counsel, other than the attorney-general, or other persons engaged by him to aid in the defense of the proceeding brought by the association. That petition was denied. Subsequently, the Superior Court issued an injunction restraining the Commissioner from paying such persons from the association's funds. At a later date the court ordered that the Commissioner may not appear in the case in propria persona or by any attorney other than the attorney-general, his assistants or deputies. The appropriateness of this later order is challenged in a second petition of the Commissioner (S. F. No. 16268), filed on June 21st.

The injunction which by the first petition the Commissioner sought to prohibit the court from making, having now been signed and filed, the only question which may now be considered in a mandamus or prohibition proceeding, assuming that either of those remedies might properly have been invoked at the time the first petition was filed, is that relating to the right to appear in propria persona or by counsel other than the attorney-general. For these reasons we do not join in the order granting a rehearing in case S. F. No. 16245, but vote for the issuance of the alternative writ of mandamus in case S. F. No. 16268, in order that the matter may be considered on the merits.

# CALIFORNIA REPORTER

IN VOLUME

## 92 PACIFIC REPORTER
SECOND SERIES

14 Cal.2d 17

## PEOPLE v. PARMAN.

Cr. 4215.

Supreme Court of California.

July 11, 1939.

**1. Jury** 🔑**58**

The Code provisions requiring that the selection and listings of jurors should be made of men and women suitable and competent to serve as jurors are directory and not mandatory. Code Civ.Proc. § 204.

**2. Jury** 🔑**33(1)**

The mere fact that women were excluded from jury lists because of lack of accommodations for a mixed jury in the event jury was required to be housed overnight did not show failure of substantial compliance with statute providing that jury lists be made of men and women, and did not prejudice rights of defendant convicted of murder in first degree. Code Civ.Proc. § 204.

**3. Homicide** 🔑**253(3)**

Evidence that, when accused fired shot, the gun was held out at arm's length at a distance of about 3½ feet from victim who had his arms down at his side, justified conclusion that the shot was intentional and in cold blood and sustained conviction for first-degree murder.

**4. Criminal law** 🔑**365(1)**

Where issue was whether homicide was murder in first degree or was accidental or in self-defense, evidence of a prior conviction, not included in the indictment, of an escape from a federal reformatory, was not admissible as an essential element of the offense charged. Pen.Code, §§ 189, 1025; § 1093, subd. 1.

**5. Homicide** 🔑**166(4)**

In murder prosecution, admission over objection of evidence of a prior conviction, not included in the indictment, of an escape from a federal reformatory, a felony, was not an abuse of discretion, on issue of motive of accused to shoot with deliberation so as not to be apprehended with a loaded gun. Pen.Code, § 189.

**6. Homicide** 🔑**338(3)**

In murder prosecution where accused was condemned by the undisputed evidence of his own conduct at, immediately prior to, and following the shooting of victim, the admission over objection of evidence of a prior conviction of an escape from a federal reformatory to show motive was not prejudicial.

**7. Witnesses** 🔑**282½**

In murder prosecution, further cross-examination of state's witness to show that victim was aggressor and that shooting was in self-defense was properly refused accused, where evidence sought to be brought out by accused was sufficiently before jury and further cross-examination would serve no relevant purpose and might confuse the issues.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Everett Gilbert Parman was convicted of murder in the first degree without recommendation, and he appeals.

Affirmed.

Thomas F. Sargent, of Auburn, and L. De Witt Spark, of Roseville, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., Lowell L. Sparks, Dist. Atty., and C. E. Tindall, Deputy Dist. Atty., both of Auburn, and F. H. Bowers, Deputy Dist. Atty., of Roseville, for the People.

SHENK, Justice.

The defendant was indicted by the grand jury of Placer county on two counts: (1) the murder of George McElroy in that county on July 16, 1938; (2) the violation of the Concealed Weapon Act (sec. 5, Stats.1923, pp. 696, 697) as connected with the murder charge. He was also charged with the prior conviction on December 22, 1938, in New Mexico, of the violation of the National Motor Vehicle Theft Act, title 18, U.S.C.A. section 408, United States Criminal Code, a felony, and with having served a term therefor in a penal institution.

The defendant pleaded not guilty and not guilty by reason of insanity to the first charge. He entered a plea of guilty to the charge contained in count 2, and admitted the prior conviction. The trial on the plea of not guilty to the first count resulted in a verdict of guilty of murder in the first degree without recommendation. On a separate trial of the issue of sanity the defendant was found to have been sane at the time of the commission of the homicide. Sentence of death was imposed in accordance with law. The defendant appealed from the judgment of conviction.

Prior to the commencement of the trial proceedings, the defendant moved to quash the venire and entered a challenge to the jury panel on the ground that the board of supervisors of Placer county in selecting the jury list for the year 1938 had selected men only and had intentionally omitted all women. It was contended that the direction of section 204 of the Code of Civil Procedure requiring that the selection and listings of jurors should "be made of men and women suitable and competent to serve as jurors" was mandatory. The trial court denied the defendant's motion and the trial proceeded by selection of jurors from the venire composed exclusively of men.

The defendant now urges that the systematic exclusion of women from jury service in Placer county precluded him from having a trial by an impartial jury and was a denial of due process of law. Actual failure of impartiality in the jury selected is not argued. The defendant is content to rest upon the theory that absence of women from the jury lists, as matter of law, presumes some prejudice to his rights, because, forsooth, women may not be as likely to impose the death penalty.

The point has been decided adversely to the defendant's contentions. People v. Shannon, 203 Cal. 139, 263 P. 522, 523. The cited case involved a conviction of murder in the first degree with the imposition of the death penalty. The trial had taken place in Amador county. The same conditions existed here as were stated in the opinion in that case, namely, that women were not included in the jury lists because of absence of accommodations which would serve the needs of a mixed jury in the event it became necessary in the trial of a criminal action to house the jury overnight. The same contention was made there as here. In disposing of the point the court stated: "* * * there is nothing in the state or Federal Constitutions, or in any statute, which guarantees one accused of a crime a trial by a jury composed of men and women, or of only men or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. People v. Durrant, 116 Cal. 179, 199, 48 P. 75. He cannot complain if he is tried by an impartial jury, and can demand nothing more. Brown v. New Jersey, 175 U.S. 172, 175, 20 S.Ct. 77, 44 L.Ed. 119. [See, also, Rose's U.S. Notes.]" Also to the same effect is the decision in People v. Manuel, 41 Cal.App. 153, 182 P. 306, where the defendant, a woman, was on trial and the jury panel consisted exclusively of women. The defendant relies especially on People v. Hines, Cal.Sup., 86 P.2d 92, wherein a negro was convicted by a jury from which members of his own race were arbitrarily excluded. On appeal the judgment was reversed. Such cases are not controlling. The defendant in the present case was not tried by a jury from which all members of his own race were arbitrarily excluded.

[1, 2] The provisions of the code sections relied upon are directory and not mandatory. People v. Durrant, 116 Cal. 179, 194, 48 P. 75. Failure of substantial compliance therewith has not been shown nor does any prejudice to the rights of the defendant appear.

On the evening of July 16, 1938, Margaret Brusso entered her home in Roseville, California, in a bruised and hysterical condition. Later and about 8 o'clock that same evening, her sister, Ruth McElroy, with the latter's husband, George McElroy, leaving Margaret at home, started out to find and identify a laundry truck driver who allegedly had attacked Margaret. They went to Zeller's confectionery in Roseville. They found no one there answering the description given by Margaret. Soon, however, the defendant entered and the McElroys asked him if he was "Gordon Tillot". He countered with, "Where is Margaret?" On further conversation he denied that he worked for the laundry, stated that he was from Chicago, that he was hot, that he was tough, that George McElroy was a young man and if he wanted to stay young and valued his life they had better let him alone. The three walked to the front of Zeller's and along the street. Others stopped and listened to their conversation. At no time did the McElroys make any specific accusation. Ruth McElroy asked the defendant to roll up his sleeve so that she could observe any tattoo marks. The defendant evaded the request. They asked him if he was the chap who had brought Margaret down from Auburn earlier in the day, which he denied. He kept his right hand inside his jacket. He repeated his statement to George McElroy that if he valued his life he had better let him alone, that he was a pretty young man to die. Asked if he would walk to their home to see Margaret, he suggested that the McElroys go for her and bring her back. When they refused to leave him and after some further conversation and an attempt by George McElroy to borrow from a friend and bystander a car in which to go for Margaret, the defendant said, "Well, come on." The three started walking down the street in the direction of Margaret's home. The defendant was walking inside next the buildings, George McElroy in the middle and his wife on his right. They proceeded quietly without conversation for a few paces when suddenly the defendant turned, faced George McElroy, whipped a gun from inside his jacket and fired one shot at him with fatal effect.

[3] The defendant testified that McElroy took hold of his coat collar as though in a threatening manner, and that he intended to use his gun only to frighten him away; that he was unfamiliar with the mechanism of the gun and that it was discharged unintentionally. But there is credible testimony, which the jury obviously believed, that when the shot was fired the gun was held out at arm's length at a distance of about three and one-half feet from the victim who had his arms down at his side. From this evidence the jury was justified in concluding that the shot was intentional and in cold blood.

While Ruth McElroy went to her husband's assistance the defendant escaped into the darkness. That same night a Ford roadster was stolen in Rocklin, California. On August 1, 1938, it was recognized by highway patrol officers at Eureka, California, as it was being driven along the highway. The car was stopped. The defendant was in it and was ordered out for questioning. He attempted to escape. At a command to "Halt!" and a gun charge fired into the air by one of the officers, he aimed several shots at the officers from the same gun which killed George McElroy. The discharges missed their mark and he was captured and disarmed.

[4] The defendant assigns prejudicial error in the admission over his objection of a record of conviction in 1930 of an escape from a federal reformatory in Ohio, a felony. This conviction was not included in the indictment. The alleged purpose of admitting it in evidence was to show motive; that is, that the defendant having been previously convicted of a felony was aware that his apprehension while carrying a loaded gun concealed upon his person would result in the conviction of a felony, and that he preferred to "shoot his way out". Another alleged purpose of the evidence was to prove that the carrying of a concealed loaded weapon amounted to a felony and that a homicide perpetrated while committing such felony amounted to possible second degree murder. Sec. 189, Pen.Code.

By the provisions of sections 1025 and 1093, subdivision (1), of the Penal Code the prior conviction charged in the indictment and admitted by the defendant could not be read to the jury nor alluded to on the trial. The prosecution contends, however, that the evidence of a prior conviction, whether of one charged and admitted or of one not charged, is admissible when such prior conviction is an essential element of the offense charged, or is pertinent to prove motive.

The case of People v. Oppenheimer, 156 Cal. 733, 106 P. 74, relied on by the prosecution, is not comparable on the facts. There the defendant was undergoing a life sentence in San Quentin when he committed an assault with a deadly weapon. Section 246 of the Penal Code prescribes the death penalty when such an assault is committed by a life convict. Pertinently the court observed that proof of the prior conviction could not be avoided when it was an essential element of the crime charged. In the present case the prior conviction did not have to be proved to establish any element or degree of the crime of murder. Section 189 of the Penal Code does not define *every homicide* other than first degree murder as murder of the second degree. In the present case the question for the jury was whether the homicide was first degree murder, as defined in said section 189, or was accidental or in self-defense.

[5, 6] However, where the shooting was, as here, claimed to have been accidental, the court could properly determine that the prior conviction had some bearing upon a possible motive to shoot with deliberation, which the defendant might have entertained. People v. Pool, 27 Cal. 572, 573; People v. Brown, 53 Cal.App. 664, 200 P. 727. Whether the evidence had sufficient weight to that end, or whether the introduction was sought merely to prove that the defendant was a man of vicious tendencies and therefore likely to have committed the homicide intentionally,

were questions primarily for the trial court to determine. In any event, we observe no prejudice because of the introduction of such evidence. The defendant was condemned by the undisputed evidence of his own conduct at, immediately prior to, and following the shooting of George McElroy. It cannot be said that the same or another jury, without the evidence objected to, would have returned a different verdict.

[7] The defendant also assigns as error the refusal of the trial court to permit him to cross-examine Ruth McElroy fully as to the purported events involving the assault upon Margaret Brusso. He contends that such cross-examination was offered, not as proof of the facts to be adduced, but as tending to prove that the decedent was the aggressor and that the shooting was in self-defense. It is obvious from the facts stated that the court permitted sufficient evidence of the purpose of the McElroys' visit to the confectionery store, and of their questioning the defendant, to accomplish the end desired by him. The trial court properly concluded that further cross-examination would serve no relevant purpose and might confuse the issues.

The defendant had a full and fair trial by an impartial jury, and nothing prejudicial to his rights is disclosed.

The judgment is affirmed.

We concur: CURTIS, J.; EDMONDS, J.; HOUSER, J.

---

14 Cal.2d 8

## PACIFIC COAST JOINT STOCK LAND BANK OF SAN FRANCISCO v. JONES et al.

Sac. 5236.

Supreme Court of California.

July 10, 1939.

Rehearing Denied Aug. 7, 1939.

**1. Ejectment 🔑114**

An owner who ejects a trespasser from his land is entitled to any crop which is standing upon it.

**2. Chattel mortgages 🔑12, 127**

A chattel mortgage on future crop is valid under the common-law doctrine of potential possession, but the lien of a continuing crop mortgage does not attach to a crop planted and produced by a third party to whom the mortgagor has conveyed an estate in the property.

**3. Landlord and tenant 🔑7**

While the usual lease requires the express or implied mutual assent of the parties, the relationship of landlord and tenant may come into existence by operation of law, although no enforceable agreement has ever been entered into by the parties.

**4. Chattel mortgages 🔑127**

Where mortgagors, who had executed continuing crop mortgage on all crops to be grown on their land, entered into oral negotiations with third parties to lease part of land to them provided that rental should be guaranteed by certain persons, occupation of land by third parties, though with tacit permission of mortgagors, amounted to no more than a "license to occupy" and did not create the relationship of "landlord and tenant," and, where license was revoked by mortgagors while crop was still standing, mortgagee was entitled to enforce mortgage against crop planted by third parties.

[Ed. Note.—For other definitions of "Landlord and Tenant," see Words & Phrases.]

**5. Contracts 🔑32**

If the parties contemplate a reduction to writing of an agreement reached in preliminary oral negotiations, there is no contract until the writing is signed.

**6. Trial 🔑395(1)**

Finding of trial court that mortgagee who held continuing crop mortgage was entitled to enforce mortgage against crop grown on land of mortgagors by third parties was not subject to attack because findings failed to state third parties were licensees, where such conclusion was the legal deduction drawn from facts found and, as such, was properly included in court's conclusions of law.

**7. Licenses 🔑58(5)**

Where licensees entered on land and planted a crop under a license to occupy granted by landowners pending negotiations by licensees to lease land, evidence that when crop was being harvested one of owners ordered licensees to stop hauling crop away and that he became involved in fist fight with one of licensees over the matter was sufficient to show a revocation of the license.

**8. Chattel mortgages** ⚷282

In action by holder of continuing crop mortgage to enforce mortgage against crop planted by third parties on mortgagors' land under a license to occupy, a finding that mortgagors were in possession of land "at all times herein referred to" and conclusion that at the time of revocation of license mortgagors "went into possession and repossessed said land," were not inconsistent when findings and conclusions were construed in their entirety.

**9. Licenses** ⚷59

Where licensees entered on land and planted crop under a license to occupy granted by landowners pending negotiations of licensees to lease land, owners were not estopped from revoking license by reason of licensees' expenditure of money and performance of labor, where basis of owners' grant of license was licensees' representation that rental guarantee which was condition precedent to entering into lease would be furnished, and such was not done.

**10. Marshaling assets and securities** ⚷4

Where licensees entered on land of mortgagors and planted crop under license to occupy granted by mortgagors, and license was revoked by mortgagors while crop was still standing, mortgagee, who held both mortgage on realty and the crops grown thereon, was not required by statutes to first satisfy its debt out of the realty, so that licensees as junior lienholders could satisfy their claim out of crops, since licensees had no lien upon standing crop after their license had been revoked. Civ.Code, §§ 2899, 3433.

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by the Pacific Coast Joint Stock Land Bank of San Francisco against C. Lee Jones, S. C. Legare and Cora Turner Legare, his wife, Pacific Broom Corn Company, Liberman-Rosencrantz Company, Joseph Liberman, Gus Rosencrantz, James Ryan, Reed Clarke, and others, to foreclose a crop mortgage. From a judgment for the plaintiff, the defendants, except C. Lee Jones, S. C. Legare, Cora Turner Legare, and James Ryan, appeal.

Affirmed.

Klein & Clarke and R. C. Ramsay, all of San Francisco, for appellant Pacific Broom Corn Co., etc.

Torregano & Stark, of San Francisco, for appellants Liberman-Rosencrantz and others.

Johnson & Harmon, of San Francisco, for respondent Pacific Coast Joint Stock Land Bank of San Francisco.

F. M. Brack, of Modesto, for respondents S. C. Legare and others.

EDMONDS, Justice.

The controversy presented by this appeal concerns conflicting claims to a crop of broom corn which had been mortgaged by C. Lee Jones and S. C. Legare to the respondent bank during the time they were vendees in possession of the land on which it was grown. The bank's right to foreclose this mortgage was challenged by the appellants, all of whom had advanced money or services for the purpose of growing the crop. James Ryan, who farmed the land, and Jones and Legare, although defendants in the action, did not appeal from the decree of foreclosure in favor of the bank.

In 1935 Jones and Legare were in possession of a 1000-acre tract of farming land in Stanislaus county under an agreement to purchase it from the bank. They were then some $15,000 in arrears in their instalment payments on the purchase price, and in September of that year respondent required them to execute a mortgage "on all crops * * * now standing, planted or growing, or that may hereafter during the continuance hereof be standing, planted or growing" on the land. This mortgage was recorded, but nothing was realized by the bank from the 1935 crops.

The next year Jones and Legare, as a means of relieving their financial burden, decided to lease a portion of the land, and with this purpose in mind Jones in April, 1936, entered into oral negotiations with the Pacific Broom Corn Company, through its agents and one Clarke, its president. It developed that the company was interested in about 600 acres on which broom corn could be grown. According to Jones' testimony, in several conversations with them he explained that he and Legare were in financial straits, that they had given a crop mortgage, and that no lease could be made except upon the condition that the rent be paid in advance or be properly guaranteed. Jones also said that when he asked about the financial status of the company, one of its agents informed him that "all financial responsibilities of the Pacific Broom Company were assumed by Liberman and Rosencrantz". Inquiries which Jones subsequently made at a San Francisco bank indicated that Liberman and Rosencrantz were financially responsible.

Jones and Legare did not wish to farm the property, and it became necessary to obtain someone to undertake this work. As a part of the plan then being considered, Ryan, a farmer living in the vicinity, was engaged by the company which agreed with him to finance his operations and to buy the crop produced.

Negotiations having reached this stage, Clarke then had a lease prepared. This lease was by Jones and Legare, as lessors, to Ryan, as lessee, for a cash rental to be paid by the lessee out of the money realized from the sale of the crop to the company. Clarke first secured the signature of Ryan, and then presented it to Legare at his residence on the tract, Jones being away at the time. According to Legare, when he asked Clarke where the guarantee was, the latter handed him an order executed by Ryan directing the company to pay the rent from the proceeds of the crops after deduction of all production costs advanced. Legare remarked that this did not amount to a guarantee of rent and refused to sign the lease, but he retained it to show to his partner, Jones. He also testified that until the lease was presented, they believed that it would run to the company as lessee.

However, as the season was late, the next day, at Clarke's suggestion, Ryan went on the land and began preparing it for planting. A week or so later Ryan asked Legare if the lease had been signed. Legare answered in the negative, explaining that they had not received the guarantee which had been promised, but that Jones was trying to get the matter straightened out. Planting and irrigation of the crop followed and several months later Ryan again inquired about the lease. He was told that the lease had not yet been signed because of the failure to deliver the guarantee. Eventually, the lease was signed by Legare and given to Jones, who never signed it because the promised guarantee by Liberman and Rosencrantz was not delivered, and it remained in his possession.

Because Ryan had not grown broom corn before, he took directions with regard to preparing the land, and planting, cultivating, and harvesting the crop from the company. Production expenses were advanced by Liberman-Rosencrantz for the account of the company. The crop ripened in September and harvesting was commenced. As the broom corn was threshed and baled, the company and Liberman-Rosencrantz began hauling it away. At this time Legare approached Clarke, who was supervising operations, and asked him what his intentions were with regard to rent. Clarke told him that he had satisfied the bank. Undoubtedly, this was the first time Legare knew that the company did not intend to deliver the guarantee, and he immediately stopped Clarke from removing any more corn and told Ryan's foreman that no more corn could be taken from the property.

Jones and Legare then notified the bank that the crop was being removed. It asked the company and Liberman-Rosencrantz what their intentions were and was told that the bank had no right to the crop, for the reason that the corn had been grown by Ryan, whom they referred to as "our man". This action was then commenced and a receiver appointed to take possession of the crop. About two-thirds of the corn had then been cut and was being dried on the ground.

From these facts the trial court determined that Ryan was not a lessee either by parol or by estoppel, but a licensee; that the license was revoked at the time Legare stopped the removal of the corn and that the lien of the mortgage attached to the unsevered portion of the crop as the property of the mortgagors, Jones and Legare. It also found that the bank had no right to the corn which had been cut at the time the receiver took possession.

[1,2] The respondent relies upon the rule that an owner who ejects a trespasser from his land is entitled to any crop which is standing upon it. Huerstal v. Muir, 64 Cal. 450, 453, 2 P. 33; Imperial Farming Co. v. Van Horn, 107 Cal.App. 717, 290 P. 1077; see annotation 39 A.L.R. 958. According to this principle of law, by analogy, Jones and Legare, as purchasers of the land, were entitled to the standing crop if the appellants' rights amounted only to a license to occupy the land. A chattel mortgage on future crops is valid under the common law doctrine of potential posses

sion (Arques v. Wasson, 51 Cal. 620, 21 Am.Rep. 718), but the lien of a continuing crop mortgage does not attach to a crop planted and produced by a third party to whom the mortgagor has conveyed an estate in the property. First National Bank v. Brashear, 200 Cal. 389, 253 P. 143. Thus, in the case at bar if, by virtue of the facts shown, Ryan or the appellants acquired a leasehold interest in the land, their claim to the entire crop is paramount. If, on the other hand, the corn was planted and grown under a mere license, the respondent's lien attached and is entitled to priority. Therefore, the answer to the principal question for decision depends upon the relationship created by the conduct of the parties.

In addressing themselves to the main question for decision, the appellants have divided their argument relating to various aspects of the evidence and findings under a number of headings. Convenience and clarity will be served by consolidating several of these points for discussion.

[3] First, they contend that the evidence and findings do not support the trial court's conclusion that they were mere licensees; on the contrary the undisputed facts compel the conclusion that a tenancy-at-will was created. Undoubtedly, although the usual lease, like any other contract, requires the express or implied mutual assent of the parties, the relationship of landlord and tenant may come into existence by operation of law although no enforceable agreement has ever been entered into by the parties. Thus, it has been held that a tenancy-at-will results where one enters and occupies land with permission of the owner under an oral contract which is invalid under the statute of frauds, Carteri v. Roberts, 140 Cal. 164, 73 P. 818; Goodwin v. Perkins, 134 Cal. 564, 66 P. 793; or under a proposed written lease which is never executed (Linnard v. Sonnenschein, 94 Cal.App. 729, 272 P. 315); or under an ineffective conveyance or agreement to convey. Hayden v. Collins, 1 Cal.App. 259, 81 P. 1120. It has likewise been held that mere permissive occupancy where no rent is reserved and no term agreed upon gives rise to a tenancy-at-will. Jones v. Shay, 50 Cal. 508.

[4-6] But these cases, on which the appellants rely, are not precisely in point under the facts here presented. The trial court found that in their oral negotiations the parties agreed to enter into a lease provided the rental should be guaranteed by Liberman-Rosencrantz and that all persons involved in the negotiations were informed of the requirement concerning such guaranty as a condition precedent to the execution of any lease. These findings have clear and substantial support, not only in the testimony of Jones and Legare but also in the testimony of an agent of the company. Moreover, on the day before Ryan and appellants started farming operations on the land, Legare, in the presence of Clarke and Ryan, refused to sign the proposed lease upon the ground that the promised guaranty had not been delivered. Twice later Ryan was informed that this was the reason for the subsequent refusals of Jones and Legare to execute the lease. The situation presented, therefore, is one where the proposed lessors positively and persistently refused to enter into a contract creating the relation of landlord and tenant because, as they contended, a condition required by them had not been met.

Under such circumstances the law will not imply the relationship of landlord and tenant. The principle is akin to the rule of contracts that if the parties contemplate a reduction to writing of an agreement reached in preliminary oral negotiations, there is no contract until the writing is signed. Toms v. Hellman, 115 Cal.App. 74, 1 P.2d 31; Spinney v. Downing, 108 Cal. 666, 41 P. 797. This rule has been applied in the case where a proposed lessee went into possession and made improvements pending negotiations for a written lease which was never executed, the court holding that because of the owner's express refusal to enter into a verbal lease, the occupancy by the proposed lessee vested no estate in him. Potter v. Mercer, 53 Cal. 667. Applying that principle to the facts of the present case, the occupancy of the land by Ryan and the appellants with the tacit permission of Jones and Legare amounted to no more than a license to occupy. Appellants' contention that the findings are vulnerable because they fail to state that Ryan was a licensee has no merit. That was a legal deduction drawn from the facts found and, as such, was properly included in the court's conclusions of law.

[7] The appellants also attack the court's conclusion that the license was revoked because, they say, it is not supported by the evidence. But the record shows

that on or about the 14th of September, when the crop was being harvested, Legare ordered Clarke, Ryan and Ryan's foreman to stop hauling the corn away and that he then became involved in a fist fight with Clarke over the matter. These acts certainly amounted to a legal revocation of the license.

[8] Construing the findings and conclusions in their entirety, there is no fatal inconsistency between the finding that Jones and Legare were in possession of the land "at all times herein referred to" and the conclusion that at the time of the revocation of the license Jones and Legare "went into possession and repossessed the said land". The evidence and findings as a whole are consistent with the legal fact of continued possession of the land by Jones and Legare. Legare and his wife lived on the land, and Ryan's permissive occupancy did not constitute legal possession. The language used by the court in describing Ryan's ouster certainly cannot be held to vitiate the judgment.

[9] Appellants argue that assuming Ryan was a mere licensee, the license was irrevocable by reason of the expenditure of money and the performance of labor that took place during his occupancy, citing the case of Stoner v. Zucker, 148 Cal. 516, 83 P. 808, 113 Am.St.Rep. 301, 7 Ann.Cas. 704, which holds that one who permitted another to enter upon his land and construct an irrigation ditch at a cost of $7,000 could not thereafter revoke the license. But that decision was grounded upon the principle of estoppel, which is inapplicable to the facts of the instant case. True, under other circumstances the tacit acquiescence of Jones and Legare in appellants' entry and conduct of farming operations might have been a sufficient representation on which to base an estoppel, but the acquiescence here was induced by and was referable to appellants' representations and assurances concerning rent. Jones and Legare demanded that the rent be guaranteed in order that payment of their obligation to the respondent bank might be assured, and the evidence shows that Clarke and his associates were keenly aware of this; indeed, as late as the day before Legare stopped the removal of the crop, Clarke told him not to worry about the rent; that the rent had been "fixed up with the bank". And it is uncontradicted that appellants entered upon the land in the face of Legare's express refusal to sign the lease because the guaranty had not been obtained.

[10] Appellants' final contention is based upon the doctrine of marshalling. It is said that even if respondent had a lien upon the crop, it should have been required to resort first to the real property described in the contract of sale in order to satisfy its debt, so that appellants as junior lienholders could satisfy their claims out of the crop. Civ.Code, §§ 2899, 3433. This argument is untenable under the conclusions reached, because it assumes that appellants had a lien upon the standing crop. As licensees whose license had been effectively revoked, appellants had no interest in or lien upon the corn which stood unsevered at the time the receiver was appointed. Jones and Legare were entitled to it as owners of the land, and through its crop mortgage the respondent bank acquired a lien which it was entitled to foreclose.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; HOUSER, J.

13 Cal.2d 754

## LONGLEY et al. v. BROOKS.

Sac. 5085.

Supreme Court of California.

June 30, 1939.

**1. Appeal and error ⇨1010(1), 1011(1)**

A judgment quieting title in grantee named in deed will not be disturbed, if findings relating to delivery to grantee are substantially supported by the evidence, or if there is a substantial conflict in the evidence upon which the findings are made to rest.

**2. Appeal and error ⇨1008(1)**

Evidence whether wife's deed of ranch was delivered to husband during wife's lifetime was question of fact for trial court.

**3. Appeal and error ⇨1011(1)**
**Deeds ⇨66**

The question of the delivery of a deed is one of fact and finding of trial court on such question based on conflicting evidence will not be disturbed on appeal.

**4. Deeds** ⚿56(4)

The mere retention by grantor of custody of deed after delivery thereof is not necessarily inconsistent with intention to convey a present title to property described in deed.

**5. Deeds** ⚿208(1)

That taxes were assessed to wife after wife's delivery of deed to husband, and that wife thereafter rented property and collected rentals and attended to other business matters relating to property and used some of her separate funds for payment of expenses connected with property, did not indicate an intention to retain title after delivery of deed.

**6. Wills** ⚿88(1)

A wife's deed to husband was not intended to be a testamentary disposition of the property named in deed, where deed was delivered to husband and was made at the same time the will was executed, and the will made no mention of the property disposed of by the deed.

**7. Estoppel** ⚿93(1)

Residuary legatees who did not, during probate proceedings, assert adverse claim to property which deceased deeded to husband, were estopped from thereafter maintaining action to quiet title to property, where legatees were aware of deed during pendency of probate proceedings and knew that husband was performing labor and making expenditures on the property in reliance on the effectiveness of the conveyance to him.

---

In Bank.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action to quiet title by Lena Longley and others against Emery E. Brooks. The defendant filed a cross-complaint. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Keyes & Erskine, W. B. Ryder, and J. Benton Tulley, all of San Francisco, for appellants.

Brown & Chamberlain and Ralph Brown, all of Modesto, for respondent.

PER CURIAM.

This was an action to quiet title to certain real property located in Stanislaus county, referred to by the parties herein as the "Newman Ranch". Prior to August 5, 1929, the undisputed title to the property was in Marcia Brooks (now deceased), who at that time was the wife of defendant Emery Brooks. The latter claimed title to the land by virtue of a deed executed in his favor on said August 5, 1929, by his then wife, the said Marcia Brooks. The plaintiffs herein are, respectively, the two sisters and a brother of Marcia Brooks, all of whom claimed title to the property as respective residuary legatees under the will of Marcia Brooks.

The trial court found in favor of defendant on all material issues, and in accordance therewith rendered its decree quieting the title to the property in favor of defendant herein. The plaintiffs have appealed from the judgment, their principal contention being that there was no "delivery" of the deed to respondent by his wife, and, consequently, that the findings of the trial court are without support in the evidence.

The record herein shows that respondent and Marcia Brooks intermarried on September 27, 1928, and lived together as husband and wife until the death of the latter in October, 1933; that Marcia Brooks was the owner of considerable real property at the time of her marriage to the respondent herein; that prior to the marriage the spouses had mutually agreed that all money acquired by either of them would be deposited in a joint bank account, and that the wife would give the husband a parcel of her real property as a home, in consideration of his taking over the management, control and improvement of the said properties. Pursuant to that agreement, and during the marriage, the husband deposited $700 or more of his own funds in the joint account, and devoted the greater part of his time to the management and operation of his wife's properties.

Concerning the circumstances surrounding the alleged delivery of the deed, the trial court found substantially as follows: That on or about August 1, 1929, at a time when one of the plaintiffs herein, Frances McGovern, was visiting at the home of Marcia and Emery Brooks, in Sonoma county, and in the presence of the said

Frances McGovern, Marcia Brooks made the statement to her husband, Emery Brooks, that during the visit of Frances McGovern, "she, the said Marcia Brooks, was going in [to the city of Santa Rosa] and fix up some 'papers' and that she was going to give said Emery Brooks some property for a home * * * and asked said Emery Brooks which one [of the properties] he would prefer, that is, the Santa Rosa ranch upon which Emery Brooks and Marcia Brooks were then residing * * * or the 'Newman ranch', that being the real property located in the County of Stanislaus, * * * [and that] said Emery Brooks stated that he desired the said 'Newman ranch', * * *. That thereupon said Marcia Brooks said 'All right'"; that the two women then proceeded to the city of Santa Rosa, where, at the office of J. W. Ford, the attorney for Marcia Brooks, she instructed him to prepare a deed to each of three parcels of her properties, and also to prepare her will; that Marcia Brooks and Frances McGovern then went to the Bank of America, in Santa Rosa, where, in writing, Marcia Brooks authorized the bank to permit Frances McGovern to have the joint use of and access to a safety deposit box which theretofore had been accessible only to Marcia Brooks; that in granting the joint use of the safety deposit box to her sister, Marcia Brooks intended the said Frances McGovern to have the right to the control and possession of the deeds prepared or to be prepared by Mr. Ford on behalf of Marcia Brooks. It was further found that on the 5th day of August, 1929, Marcia Brooks and her husband, Emery Brooks, went to the city of Santa Rosa; that upon their arrival there the former called at the office of said Mr. Ford and at that time and place executed and acknowledged each of the three deeds (one of which was the deed herein concerned) which had been prepared by Mr. Ford in accordance with the request of Marcia Brooks; also, that at that time and place she executed her last will; that at the request of Marcia Brooks, Mr. Ford "enclosed said deeds in an envelope and *partially or wholly* sealed the same and delivered the envelope and its contents to said Marcia Brooks" (emphasis added); that immediately thereafter the latter left the office of her attorney and joined her husband; that the two proceeded to the Bank of America "to place in the safety deposit box * * * the said deeds so executed"; that previously it had been agreed between husband and wife that at all times the husband should have the use of said safety deposit box as a depositary for "papers" belonging to him; that upon their arrival at the bank on said August 5, Marcia Brooks "opened said envelope containing said deeds and then and there *exhibited to said Emery E. Brooks* the deed which she had just executed, conveying to him the real property located in Stanislaus County * * * and then and there *delivered* to him the actual, manual custody and control thereof and informed him that she had deeded the said property to him" (emphasis added); that thereupon said Emery Brooks placed the deed with certain papers belonging to him "and then and there delivered the same and all thereof, together with said deed to said Marcia Brooks for the purpose of safe-keeping and for no other purpose"; that Marcia Brooks then placed the papers, including the deed which had been handed to her by her husband, in the safety deposit box. The findings further recite that "it was then an there the purpose and intention of said Marcia Brooks to make * * * a full, complete and actual delivery of said deed to said Emery Brooks with the intention * * * of conveying to said Emery Brooks the full legal title to said real property * * * and that said delivery should be irrevocable". It was also found that all of the acts and transactions of said Marcia Brooks—beginning with the conversation had on the morning of August 1, when, in the presence of Frances McGovern, she asked her husband which ranch he preferred, and ending with the placing of his "papers" (including the deed) in the safety deposit box—constituted one entire transaction; and that those acts and transactions were intended by Marcia Brooks to constitute an immediately effective conveyance to said Emery Brooks of the real property here involved. The trial court further found that later in the year 1929, on an occasion when Marcia Brooks and Frances McGovern were again at the bank hereinabove mentioned, Marcia Brooks showed the latter a certain envelope containing the three deeds and told Frances McGovern (whom she had appointed executrix of her will) that "those were the deeds" and that in case anything happened to her (Marcia Brooks) the said Frances McGovern would find the deeds either in the safety deposit box or at the office of Mr. Ford.

After the death of Marcia Brooks, the three deeds were found in the safety deposit box and, according to some of the testimony, they were in the same envelope in which they had been placed originally by Mr. Ford,—and when so found the envelope which contained them was sealed, and there was a conspicuous "dirty smudge" on the outside of the flap of the envelope.

[1, 2] In accordance with well-established law, it is clear that if the findings relating to the delivery of the deed to the respondent are substantially supported by the evidence, or if there is a substantial conflict in the evidence upon which the findings are made to rest, the resulting judgment may not be disturbed. The appellants contend, however, that there is not sufficient evidentiary support for the finding as to the delivery of the deed. They call attention to testimony of the witness Ford to the effect that at the time the deeds were executed, and at the request of Marcia Brooks, he placed them in an envelope and *sealed* the envelope—and point out that there was evidence to show that after the death of Marcia Brooks the three deeds were found in a *sealed* envelope, which was conceded to be the same envelope in which the deeds originally had been placed by Mr. Ford. From a consideration of these two circumstances, appellants contend that the only inference that could be drawn therefrom was that the envelope had not been opened subsequent to the time it left Mr. Ford's possession and until after the death of Marcia Brooks, and that, as a consequence thereof, the testimony of respondent to the effect that on August 5, while he and his wife were at the bank, she exhibited and delivered to him the deed, was inherently improbable—and could form no basis for the finding of the trial court that on the occasion last mentioned the deed was in fact delivered to respondent. However, as stated hereinbefore, the trial court found that when Mr. Ford handed the deeds to Marcia Brooks, he "sealed or *partially* sealed" (emphasis added) the envelope in which the deeds were placed,—and that when Marcia and Emery Brooks were at the bank, the former "opened" the envelope and delivered the deed into her husband's hands. Had the envelope been only "partially" sealed by Mr. Ford—as the trial court found might have been the case—the finding of the subsequent "opening" of the envelope by Marcia Brooks, at the time when (presumably) she made the delivery, would have been entirely consistent with and supported by the positive testimony of Emery Brooks as to the delivery of the deed to him by his wife on the said August 5. From the fact, as found by the trial court, that Marcia Brooks did open the envelope on that occasion, the inference may well have been drawn that she sealed the envelope thereafter—and that it was her act in that regard, and not Mr. Ford's act, that accounted for the sealed and soiled condition of the envelope when it was found after her death. Also, the respondent contends that Mr. Ford's positive testimony that he sealed the envelope at the time it left his possession is weakened by the fact that his testimony in that regard was unsupported, since the only witness to the alleged incident (Marcia Brooks) is now deceased; also, that the "dirty smudge" which was found to be on the outside of the envelope, along the flap thereof, at the time it was opened after the death of Marcia Brooks—when viewed in the light of Mr. Ford's testimony that the envelope in which he placed the deeds was an "unused" envelope and that he (Mr. Ford) had not noticed such a "smudge" mark on the outside thereof at the time he handed it to Marcia Brooks—was an additional circumstance from which the inference might have been drawn that the envelope had been opened on the occasion when respondent testified the deed was delivered into his hands, and that the "smudge" might have been caused by the re-sealing of the envelope thereafter. Of course, as frequently may be observed, the mucilage on the inside of the flap on the envelope may have been only inappreciably moistened, with the result that the sealing at that time may have been very slight. In any event, the weight to be given the testimony as to the sealing of the envelope, as well as that of all the other testimony bearing on the question of the delivery of the deed, presented a question of fact for determination by the trial court.

In further support of their contention that there was no evidence showing delivery of the deed by Marcia Brooks to the respondent herein, the appellants rely upon the testimony of the witness, Frances McGovern, in effect, that some months after August 5, 1929, she had asked Marcia Brooks if she had shown the deed to her husband, and that she replied that she had not done so; that the witness then had asked her why she had not, and Marcia Brooks had replied: "Well, for several good reasons, * * * he would lose all interest in the Santa Rosa ranch", and "* * * he still corresponds with his second [former] wife".

As opposed to the testimony last above recited in support of appellants' contention that there was no delivery of the deed, the respondent's testimony was substantially as follows: that on August 5, at the time when his wife and he were together at the bank and while he was looking at his insurance papers, his wife said to him:

"'I want to show my husband what a good wife he has got', and [she] presented me the deed. * * *

"Q. She handed you the deed then? A. Yes, sir, gave me the deed.

"Q. Did you look at the deed? A. Yes, sir.

"Q. What deed was that? A. I opened up the deed and read, it was—it stated on it this Orestimba Rancho of Newman. * * *

"Q. After you read that deed, or examined it, what did you then do with it? A. I laid it down on top of this pink [automobile] slip and insurance papers. * * *

"Q. What was then done with those? A. My wife picked them up. * * *

"Q. Did you say anything to your wife after your wife handed you the deed? A. Yes sir, I looked at it and read which place it was what I wanted, and I thanked my wife * * *.

"Q. Was that [deed] placed in your wife's safe deposit box with your consent? A. Yes, sir. * * *

"Q. And for what purpose? A. For safe keeping."

[3] A question as to the delivery of a deed is one of fact (Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703); and a finding made by a trial court on such a question, based on conflicting evidence, will not be disturbed on appeal. Haralson v. Bank of America etc., Ass'n, 15 Cal.App.2d 620, 59 P.2d 885; to the same effect, see Duffy v. Duffy, 71 Cal. App. 251, 235 P. 62; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708, and Blackledge v. McIntosh, 85 Cal.App. 475, 259 P. 770. It therefore becomes apparent that the testimony of Frances McGovern that, some time after the alleged delivery of the deed, Marcia Brooks had stated to her that she (Marcia Brooks) had not shown the deed to respondent, and the testimony of Emery Brooks in respect to the delivery of the deed to him, as above recited, are squarely conflicting one with the other. Notwithstanding such conflict, however, the respondent contends that there was ample evidence to support the findings, and that in weighing the evidence the trial court did not err in rejecting the testimony of Frances McGovern to the effect that Marcia Brooks had told her she had not shown the deed to respondent—and asserts in that regard that the improbability of the testimony of Frances McGovern, particularly that relating to the respondent and his former wife, is demonstrated by the fact that, although as testified to by respondent, he had previously been married and had children by the former marriage, the record is devoid of any evidence whatever that might or did show that the husband and wife herein did not live together in amicable relations up to the time of the death of Marcia Brooks in 1933. The merit of such contentions must be conceded. Furthermore, not only was there evidence to show that prior to the marriage the parties had agreed that Emery Brooks would be given one of the properties owned by Marcia Brooks in return for certain services he was to perform in and about the ranches, which services the evidence indicates he did perform, but the undisputed fact is established by the evidence, including the testimony of appellant Frances McGovern, that—in consonance with the prior agreement of Marcia Brooks to give one of her properties to said Emery Brooks—on the morning of August 1, 1929, his wife asked him which of her properties he preferred, and upon receiving his answer thereto she immediately took steps to have a deed to the property drawn in his favor, which deed was executed a few days later in the presence of her attorney. In view of those circumstances, the testimony of respondent that his wife delivered the deed to him almost immediately after its execution cannot be said to be inherently improbable.

The appellants also contend that, assuming there was manual delivery of the deed to respondent on August 5, 1929, there was no intention on the part of the grantor to *convey title* to the property, in that, after the alleged delivery of the deed, the acts of the grantor showed she had reserved the right of dominion and control over both the deed and the property.

[4] In answer to such contention, it may be said that the mere retention by a grantor of the custody of a deed after delivery thereof is not necessarily inconsistent with an intention to convey a present title to the property described in the deed. Stone v. Daily, 181 Cal. 571, 581, 185 P. 665; Goodman v. Goodman, 212 Cal. 730, 300 P. 449; King v. Fragley, 19 Cal. App. 735, 127 P. 813. Although, in the instant case, the deed was placed in a safety deposit box after the purported delivery thereof and, technically at least, thereafter it was in the joint possession of both Frances McGovern and Marcia Brooks, the respondent testified that it was placed therein with his consent, and for safe keeping; and the trial court so found. The evidence showed no act on the part of Marcia Brooks thereafter that was inconsistent with the theory that she was keeping the deed for and on behalf of the respondent. It was shown that Marcia Brooks had permitted Frances McGovern, as executrix under her will, to have joint access to all the papers placed in the box in order that upon her death they would be available to said Frances McGovern. Whether it be considered that the deeds were left for safe keeping with Marcia Brooks, or by her placed in the custody of Frances McGovern, as executrix of her will, or otherwise would be immaterial, since, based upon substantial evidence to that effect, the trial court found that a valid delivery of the deed to respondent had taken place.

[5] Neither can it be said there is merit in the contention of appellants that after the asserted delivery of the deed, certain acts of the grantor allegedly showing an exercise by her of dominion or control over the property conclusively negatived an intent on her part to have transferred title to the ranch by the delivery of the deed. In view of the many circumstances which showed an intention on the part of Marcia Brooks to part with title to the land, neither the fact that after the alleged delivery of the deed to Emery Brooks the taxes on the property continued to be assessed to her, nor that, personally, she rented the property and collected the rentals therefrom, and personally attended to other business matters relating to the property, is sufficient to overcome an inference of delivery of the deed and consequent transfer of title which was deducible from other evidence. In this regard, see: Stewart v. Silva, 192 Cal. 405, 410, 221 P. 191; Follmer v. Rohrer, 158 Cal. 755, 112 P. 544; and Blackledge v. McIntosh, 85 Cal. App. 475, 259 P. 770. In the last two cases cited it was held that a showing of such circumstances merely raised a conflict in the evidence on the question of the sufficiency of the delivery of the deed. In the instant case, also, there was evidence to the effect that, prior to their intermarriage, the husband and wife had agreed that the wife would handle all the business matters relating to the properties; and the evidence showed that the proceeds from the ranches were deposited in a joint bank account, and most of the expenses connected with the operation of the ranches were paid from that account. Considering the established relationship which existed between the husband and the wife, the fact that on occasion the wife may have used some of her separate funds for the payment of expenses connected with the property described in the deed to the husband, it cannot be said that, under the circumstances existing here, such fact indicated an intention on her part to have retained title to the said property.

[6] Nor is there merit in the contention that the deed was intended to be a testamentary disposition of the property. The will was made at the same time the deeds were executed. It made no mention of the property disposed of by the deeds. In view of all the facts and circumstances shown to be present, it is evident that the deed here involved was made for the specific purpose of taking the real property therein described entirely out of the testamentary disposition.

Likewise, the contention of the appellants that the findings are inconsistent one with the other, or the others, may not be upheld. When read as a whole, the findings are not thus conflicting in any substantial particular, and are adequate support for the judgment.

[7] Bearing in mind the ruling by this court with reference to the merits of the cause, which hereinbefore has been indicated, the final contention of the appellants to the effect that the finding that they were estopped from maintaining the present action is not supported by the evidence, becomes immaterial. However, in that regard, the record shows that after the death of Marcia Brooks the deed here concerned was delivered to respondent by Mr. Ford, in the presence of the executrix, Frances McGovern. Thereafter re-

spondent recorded the deed. It was found that at all times during the pendency of the probate proceedings, the appellants were aware of the existence of the deed to respondent, and that they knew he was performing labor and making expenditures on the property in reliance on the effectiveness of the conveyance to him. Nevertheless, during the probate proceedings neither they, nor any of them, asserted an adverse claim to the property, nor made any effort to exercise control over it. At the time the estate was closed, appellants accepted distribution of the personal property bequeathed to them by the terms of the will; but after distribution had been made, and at a time less than two weeks after the decree of distribution had been entered—for the first time, as residuary devisees under the will, they asserted a right to the ranch involved herein. The respondent contends that by the foregoing acts on the part of the appellants during the probate proceedings, he was deprived of the right to defend against an attack on the validity of his deed—which should have been made during that time, if at all—or to assert by the filing of a claim therefor, or otherwise, any other right against the estate which might have been then open to him. The trial court found in favor of the respondent on that issue. There was ample evidence to sustain the finding.

The judgment is affirmed.

---

## SHEA et al. v. LEONIS et al. *

L. A. 17079.

Supreme Court of California.

June 29, 1939.

Rehearing Granted July 27, 1939.

**1. Corporations 🔑1**
**Landlord and tenant 🔑208(4)**

If a corporation was organized for sole purpose of taking an assignment of a lease and was without other assets, the separate corporate existence of the corporation would be disregarded and its liability as the last assignee of lease would be treated as the liability of persons who were beneficial owners of its corporate stock.

**2. Corporations 🔑1**
**Landlord and tenant 🔑208(4)**

Stockholders of a corporate assignee of a lease, while enjoying benefits of lease, cannot equitably claim that they may escape burdens through device of taking an assignment of the lease in the name of a corporation which is without other assets and has been organized by them for purpose of taking the assignment.

**3. Corporations 🔑1**

Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice.

**4. Fraudulent conveyances 🔑41**

A debtor cannot evade payment of his debts by forming a corporation which does not assume the debt and thereafter transferring all his assets to it.

**5. Corporations 🔑1**

Liability cannot be avoided by taking an obligation, such as a lease, in the name of a specially organized corporation which has no other assets.

**6. Corporations 🔑378**
**Landlord and tenant 🔑208(4)**

Where stock of corporate assignee of lease was held for corporate assignor and assignee was organized for purpose of terminating liability of assignor for obligations under lease, assignment was ineffectual to relieve assignor of liability for rent accruing subsequent to purported assignment.

**7. Landlord and tenant 🔑208(4)**

An assignee of lease cannot escape liability by an assignment which is merely colorable.

**8. Limitation of actions 🔑24(2)**

An action by lessors against corporate assignee of lease, its stockholders, and subsequent corporate assignee, dominated by same stockholders, which was organized for sole purpose of taking assignment in order to defeat collection of rent, to recover rent accruing under lease within four years of action brought was upon the written contract of lease, and hence was not barred by limitations.

**9. Landlord and tenant 🔑230(1)**

In lessors' action for rent complaint alleging facts showing the virtual identity of corporate assignee of lease, its stockholders, and another corporation organized by it for sole purpose of taking assignment of lease in order to defeat collection of rents was not demurrable.

---

*For subsequent opinion see 96 P.2d 332.

**10. Landlord and tenant ⚷230(1)**

In lessors' action to recover rent from corporate assignee of lease, its stockholders, and a subsequent corporate assignee, dominated by the same stockholders, which was organized for purpose of taking assignment in order to defeat collection of rents, a count against a person claimed to hold stock in subsequent assignee did not state a cause of action where it was not alleged in such count that stockholder had a beneficial interest in the stock, so as to impose liability on theory of disregard of corporate identity.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Lusannah C. Shea, Willard W. Shea and Willard W. Shea, as administrator of the estate of John G. Shea, deceased, against J. B. Leonis, Sr., and others to recover rentals and other items claimed to be due plaintiffs under terms of a lease. From an unsatisfactory judgment, plaintiffs appeal.

Reversed in part and affirmed in part.

Prior opinion, 85 P.2d 491.

De Coto & St. Sure, of Oakland, and Chapman & Chapman, of Los Angeles, for appellants.

Young & Kelly, Edward R. Young, and Frank R. Johnston, all of Los Angeles, for respondents J. B. Leonis, Sr., and J. B. Leonis, Jr.

Gibson, Dunn & Crutcher, of Los Angeles (S. M. Haskins, Ira C. Powers, and Frederic H. Sturdy, all of Los Angeles, of counsel), for other respondents.

SEAWELL, Justice.

This is an action to recover accrued rent in the sum of $16,833.33, with interest, and also taxes and assessments in the amount of $5,435, which the lessee agreed by the lease to pay. Plaintiffs appeal from the judgment entered for defendants upon counts 1, 2, 4 and 5 of the complaint after the sustaining of defendants' general and special demurrers to said counts.

Defendant J. B. Leonis, Inc., assignee of a ninety-nine year lease, transferred said lease to defendant Boyle Avenue Investment Company. The rent herein sued for accrued subsequent to this transfer. The court below held good count 3 of the complaint, which states a cause of action against Boyle Avenue Investment Company as last assignee of the lease. The court also held good count 6 as against J. B. Leonis, Inc. Said count alleged that by the terms of the lease an assignment thereof did not operate to release the assignor from liability on the lease if at the time of the assignment it was in default as to any terms of the lease. It is averred that J. B. Leonis, Inc., was in default upon the covenants of the lease on December 21, 1931, when it assigned said lease to Boyle Avenue Investment Company.

It appears from the counts involved on this appeal that defendants J. B. Leonis, Sr., and J. B. Leonis, Jr., own all stock of J. B. Leonis, Inc., which is described as a "financially responsible company". The stock of Boyle Avenue Investment Company stands in the names of J. B. Leonis, Jr., and Adelina F. Leonis, his wife. The theory of plaintiffs is that defendant Boyle Avenue Investment Company is but the alter ego of its stockholders, and that it was organized for the sole purpose of taking an assignment of the lease and is without other assets, with the result, plaintiffs contend, that the separate corporate identity of said company should be disregarded and its stockholders held for the rent herein sued for.

It is alleged in count 1 that the stock of Boyle Avenue Investment Company, in the names of J. B. Leonis, Jr., and Adelina F. Leonis, is held for J. B. Leonis, Sr., and J. B. Leonis, Jr., against whom judgment is prayed for in this count. In count 2 it is alleged that the stock is held for J. B. Leonis, Inc.; in count 4, that J. B. Leonis, Jr., and Adelina F. Leonis are themselves the beneficial owners; and in count 5, that it is held for J. B. Leonis, Sr., J. B. Leonis, Jr., and J. B. Leonis, Inc. Each count prays for judgment against the parties, respectively, for whom the stock of Boyle Avenue Investment Company is alleged to be held.

[1, 2] We entertain no doubt that if Boyle Avenue Investment Company was organized as above outlined its separate corporate existence should be disregarded and its liability as last assignee of the lease held to be the liability of the persons who are the beneficial owners of all its corporate stock. Defendants point to cases which hold that if the lessor does not restrict assignment to solvent transferees,

an assignment may lawfully be made to an insolvent. Johnson v. Sherman, 15 Cal. 287, 76 Am.Dec. 481; Lindley v. Sale, 140 Cal.App. 662, 668, 36 P.2d 130. These cases are not controlling in the circumstances set out in the complaint. The stockholders of the corporation assignee, Boyle Avenue Investment Company, while enjoying the benefits of the lease, cannot equitably claim that they may escape its burdens through the device of taking the assignment of lease in the name of a corporation which is without other assets and has been organized by them for the purpose of taking such an assignment.

[3-5] Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice. Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Erkenbrecker v. Grant, 187 Cal. 7, 200 P. 641. For example, a debtor may not evade payment of his debts by forming a corporation which does not assume the debt and thereafter transferring all his assets to it. Higgins v. California Petroleum & Asphalt Co., 122 Cal. 373, 55 P. 155; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Grotheer v. Meyer Rosenberg, Inc., 11 Cal.App.2d 268, 53 P.2d 996; Sunset Farms, Inc., v. Superior Court, 9 Cal.App. 2d 389, 50 P.2d 106. The equitable principle underlying these decisions is equally applicable where, as in the instant case, the device adopted is not a transfer of assets, but an attempt to avoid liability for benefits enjoyed by means of taking the obligation in the name of a specially organized corporation which has no other assets.

[6, 7] As to the count which avers that the stock of the newly organized Boyle Avenue Investment Company was held for J. B. Leonis, Inc., the corporation assignor, and that the new company was organized for the purpose of terminating liability of the assignor, it may be said in addition that the assignment is, in effect, as plaintiffs allege, no assignment at all and that the new corporation is but the old one under another name. An assignee cannot escape liability by an assignment which is merely colorable. 1 Tiffany, Real Property 2d Ed. 184; 16 R.C.L. 866.

[8] An action against defendants for rent accruing under the lease within four years of action brought is upon the written contract of lease (Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780), and hence would not be barred by the statute of limitations.

[9, 10] We conclude that the several counts state a cause of action against the parties which they respectively seek to hold, with the exception that count 5 states no cause of action against Adelina F. Leonis, but only as to defendants J. B. Leonis, Sr., J. B. Leonis, Jr., and J. B. Leonis, Inc. Count 4 based on the theory that J. B. Leonis, Jr., and Adelina F. Leonis are beneficial owners of the stock of Boyle Avenue Investment Company, properly includes Adelina F. Leonis as a party against whom recovery is sought, but it is not averred in count 5 that she has any beneficial interest in said stock, with the result that in said count 5, liability against her on the theory of disregard of the corporate identity is not made out.

The defendants also filed special demurrers urging uncertainty and ambiguity in several particulars. We are of the view that the complaint is not subject to special demurrer in any of the particulars relied on.

The judgment for defendants entered upon demurrer is reversed except as to the judgment for Adelina F. Leonis, on the fifth count of the complaint, which is affirmed, appellants to recover costs.

We concur: CURTIS, J.; LANGDON, J.; HOUSER, J.

---

14 Cal.2d 1

## PEOPLE v. BRAUN.

Cr. 4230.

Supreme Court of California.

July 8, 1939.

**1. Criminal law 🔑1159(1)**

In reviewing the correctness of factual determinations, the function of an appellate court is limited to the question whether there is substantial evidence in the record to support the conviction.

**2. Criminal law 🔑1159(1)**

To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all.

**3. Criminal law ⚷327**

Where there is positive direct testimony that the defendant was one of the perpetrators of a crime, it is incumbent on defendant to show that testimony is inherently unbelievable, in order to prevail.

**4. Criminal law ⚷553, 554**

In robbery prosecution, jury was not obliged to believe testimony of defendant and his alleged confederates, where each of them had been previously convicted of a felony.

**5. Robbery ⚷24(3)**

In robbery prosecution, evidence sustained conviction, as against contention that evidence was so improbable as to be unworthy of all belief, notwithstanding that state's witnesses who identified defendant had little opportunity to observe masked robbers, and notwithstanding that their testimony was not particularly convincing, where witnesses were apparently disinterested.

**6. Witnesses ⚷337(6)**

In robbery prosecution, trial court did not err in permitting district attorney to ask defendant whether he had been convicted of murder, notwithstanding that appeal was pending and conviction in murder case was thereafter reversed.

**7. Criminal law ⚷1170½(5)**
**Witnesses ⚷350**

In robbery prosecution, district attorney's conduct in asking defendant about the details of a crime for which he had previously been convicted constituted error, but not reversible, where no request had been made to admonish jury.

**8. Criminal law ⚷1171(1)**

Whether prosecuting attorney's misconduct has prejudiced the substantial rights of a defendant rests largely on the facts of each case.

**9. Criminal law ⚷1186(4)**

An appellate court may only reverse a judgment of conviction, where it appears from all the facts that there has been a miscarriage of justice. Const. art. 6, § 4½.

**10. Criminal law ⚷1186(4)**

Where evidence introduced by state in robbery prosecution was not very convincing, district attorney's misconduct in asking defendant concerning details of a crime for which he had previously been convicted and in asking him whether place where he claimed he was during robbery was not a place where ex-convicts gathered, constituted reversible error. Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

George Braun was convicted of robbery in the first degree, and he appeals.

Reversed.

Prior opinion, 88 P.2d 750.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren and U. S. Webb, Attys. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

EDMONDS, Justice.

The defendant was charged by the district attorney with the crime of robbery, and also, with the prior conviction of a felony, which he admitted. Harry Groves and John Robles were named in the information as co-defendants, but the charge against them was dismissed before trial. The case then proceeded with Braun as the sole defendant. Found guilty by a jury, he has appealed from the judgment rendered upon its verdicts, contending that the testimony concerning his participation in the crime is so inherently improbable as to amount to no substantial evidence; also, that the district attorney was guilty of prejudicial misconduct.

At about 4:30 on a January morning, three men, armed with deadly weapons, entered the office of the United Independent Dairies in the city of Los Angeles and held up the three employees then on duty, obtaining a small amount of money and some personal property. Kenneth Weston, one of the victims of the crime, testified that he was sitting in the office of the dairy company dozing, with his head down on the desk before him, when a man, later identified as Harry Groves, hit him on the head, saying, "This is a stick-up". Groves, who carried a pistol, told him to lie down on the floor and then jerked out the cords connecting the telephone and desk lamp. At this point another man came in the door, carrying a rifle. Weston was not then prone on the floor but on his hands and knees facing the door. He observed that this second man, whom he identified as the defendant, had on a tweed overcoat, a dark hat and a grayish muffler, the muffler covering the lower part of his face, leaving the portion from his upper lip to his eyebrows exposed. Gray hair above his temples could also be seen.

This witness also testified that the defendant came over and stood about three feet from him while Groves and the third robber, later identified as John Robles, went into the back room and brought the two other employees into the office, where they were forced to lie on the floor. The three gunmen were there for about 15 minutes, during which time they robbed the three employees and made Weston get up several times to try to open the company safe. Weston testified that on these occasions he had a better opportunity to look at the defendant, but that Braun did not say anything which he heard.

Weston's first identification of the defendant was made some time after the crime when, at the police station, he picked out his picture from among those of 30 or 40 persons who were then under suspicion. At the trial he was very positive that Braun was the man with the rifle. When asked whether on the night of the holdup he noticed anything in particular about the defendant which made him positive of his identity he replied: "Yes, his size and his gray hair around the temples and at the time * * * well, after the holdup, I kept thinking that there was something that I should remember about him. I couldn't just think what it was though, and in the meantime the deputy sheriff had been showing me numerous pictures of suspects, and as soon as they showed me the pictures, why I picked it out right away because he had a scar on his nose, and I felt sure that that was what I should have remembered about it."

Groves and Robles, who admitted their complicity in the crime, were also identified by Weston, but at the preliminary hearing he felt least positive that Braun was one of the three who had held him up. After the crime, the record shows, Weston told the investigating officers that one of the robbers, wearing a tweed coat, dark hat and gray scarf, was a dark complexioned man—"possibly a Filipino, age about 40 years, and weight 155 pounds, five foot eight" or possibly taller. It does not appear that he mentioned a scar on any of the three men. At that time he was not certain about the description but stated that he could positively identify the men if he saw them.

The two other employees of the dairy company were also called as witnesses at the trial and at that time each was fairly sure that Braun was a participant in the crime. However, at the preliminary hearing one of these witnesses was not able to identify him "beyond a reasonable doubt"; the other "couldn't say for sure" whether he saw either Braun, Robles or Groves at the time of the holdup.

Groves and Robles were both called as witnesses in behalf of the defendant. Groves testified that he, Robles, and a Spaniard whom he referred to as "Pancho" committed the robbery in question; that he did not even know Braun at that time and did not make his acquaintance until a month and a half after the robbery. Robles also testified that he did not meet Braun until about the same time.

The defendant also took the witness stand. He was then a man about 46 years of age, over six feet tall, weighing about 190 pounds and not having a dark complexion. He denied any knowledge of or complicity in the robbery. He testified that he spent the evening of January 30th with a Mrs. Gerber. She did not appear at the trial, but as a witness upon defendant's motion for a new trial she fully corroborated the defendant's alibi.

[1-3] It is a familiar rule that in reviewing the correctness of factual determinations, the function of an appellate court is limited to the question whether there is any substantial evidence in the record to support the judgment. To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Friday, 18 Cal.App.2d 197, 63 P.2d 303. In a case such as the present one, where there is positive direct testimony that the defendant was one of the perpetrators of the crime, it is incumbent upon him to show that the testimony is inherently unbelievable in order to prevail. "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we

think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do." People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1108, 1114.

[4, 5] It must be conceded that the evidence tending to connect this defendant with the crime is not entirely convincing. It is certain that the victims had only a very limited opportunity to observe their assailants. Moreover, the statements and testimony of each of them present substantial inconsistencies which are difficult to reconcile. On the other hand, these witnesses were presumably disinterested and had no reason to fabricate testimony in order to obtain the conviction of the defendant. The jury was not obliged to believe the testimony of Robles, Groves, and the defendant, each of whom at the time of the trial had been previously convicted of a felony. Considering all of the evidence, it cannot be said, as a matter of law, that the testimony of the three employees of the dairy company was so improbable as to be unworthy of all belief.

Upon the point that the district attorney was guilty of prejudicial misconduct during the trial of the case, the record discloses that he asked the defendant: "Isn't it a fact, Mr. Braun, that you have been convicted of the crime of murder, arising out of a robbery at the Bee Hive Cafe?" Upon objection this question was reframed as follows: "Isn't it a fact that in the last part of July of this year you were convicted of the crime of murder?" The defendant replied, "I will not know until I hear from my appeal". He later admitted, in response to other questions, that he had been convicted of the crime of murder in the first degree and, also, of the crime of attempted murder.

[6] The defendant points out that his conviction in the murder case has since been reversed upon appeal (People v. Braun, Cal.App., 88 P.2d 728), and claims that the district attorney's reference to this conviction was not a proper impeachment question because the appeal was pending at that time. However, it has been squarely held that a witness, for the purpose of impeachment, may properly be asked upon cross-examination whether he has been convicted of a felony, even though an appeal from the judgment of conviction is then pending and undecided. People v. Rogers, 112 Cal.App. 615, 620, 297 P. 924. There was, therefore, no error in allowing the fact of these convictions to be presented to the jury.

[7] But the defendant also properly complains that one of the questions asked him included the details of the crime for which he suffered a previous conviction. This inquiry went beyond that allowed by law, for a cross-examiner's question must be limited to the fact of conviction and the nature of the crime; he may not go into the details or circumstances surrounding the crime. People v. David, Cal.Sup., 86 P.2d 811; People v. Chin Hane, 108 Cal. 597, 41 P. 697; People v. Muchupoff, 79 Cal.App. 306, 249 P. 240. No request to admonish the jury was made by defendant's counsel and if this question were the only misconduct of the district attorney, it would not be a sufficient ground for a reversal of the judgment.

However, the defendant points out that the cumulative effect of this question should be considered in connection with other asserted misconduct of the district attorney. It appears that during the cross-examination of the defendant he was asked: "Mr. Braun you spent the day of the 31st of January with Mrs. Kessler, is that right?" Upon receiving an affirmative reply, the inquiry was continued with the question, "And she runs the Spanish Kitchen on East 1st Street?" "She did at one time", answered the defendant. "And that is a hang-out for ex-convicts?" asked the district attorney. An objection to this question was sustained and the court admonished the jury to disregard it.

[8, 9] Whether the misconduct of a prosecuting attorney has prejudiced the substantial rights of a defendant must rest largely upon the facts of each case. An appellate court may only reverse the judgment when it appears from all the facts that there has been a miscarriage of justice. Const. Sec. 4½, Art. VI. Obviously, conduct of a prosecutor which would amount to prejudicial misconduct in one case might not result in a miscarriage of justice in another case. In other words, there is no definite rule by which asserted misconduct may be measured for the purpose of determining whether it prevented the defendant from having that fair and

impartial trial which the law requires for every person charged with a crime.

In the present case the defendant was convicted of a felony upon testimony concerning identification which, although measuring up to the requirement of substantial evidence, leaves considerable doubt in the mind of one who reads it in connection with the defendant's positive denials, the corroboration of his alibi, and the statements of those originally charged as co-defendants with him that he was not present. For many persons, positive identification is difficult, even where one is observed under normal conditions. Considering the time when the robbers came to the dairy company's office, the masks which they wore, the positions the employees were forced to take, and the excitement of the moment, it would be surprising if any one of the victims could describe the robbers with accuracy. Unquestionably the witnesses testified to their best recollection, and under ordinary circumstances a verdict resting upon their testimony and the other facts in the case should be upheld as supported by the evidence.

[10] But to what extent, if at all, the jury was influenced by the questions of the district attorney which the defendant asserts amounted to misconduct no one may say with certainty. The testimony of the prosecution's witnesses does not point unerringly to the defendant's guilt, and when weighed by the jury as against that offered by the defendant, the scales of justice would undoubtedly be somewhat evenly balanced in the mind of the ordinary person. Under such circumstances, the information that the crime of which the defendant had been previously convicted was murder arising out of a cafe robbery and the inference that he associated with ex-convicts undoubtedly weighed heavily against him and may have been the deciding factors which brought about his conviction. The misconduct of the district attorney, therefore, resulted in a miscarriage of justice entitling the defendant to a new trial. People v. MacPhee, 26 Cal.App. 218, 146 P. 522; People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377.

The order denying a new trial and the judgment are, and each of them is, reversed.

We concur: CURTIS, J.; SHENK, J.; HOUSER, J.

---

35 Cal.App.2d Supp. 752

## CHURCH v. PAYNE.

C. A. 4294.

Appellate Department, Superior Court, Los Angeles County, California.

June 26, 1939.

**1. Statutes ⚷241(1)**

The requirement that penal statutes be strictly construed does not require that the plain object of a statute be defeated by an overnice construction.

**2. Witnesses ⚷22**

The statute requiring that witness disobeying a subpœna forfeit $100 and damages to party aggrieved is a "penal statute" as far as the forfeiture is concerned but being a part of the Code of Civil Procedure, is not subject to the rule of strict construction and is to be liberally construed with a view to effect its objects and to promote justice. Code Civ.Proc. §§ 4, 1992.

[Ed. Note.—For other definitions of "Penal Laws," see Words & Phrases.]

**3. Witnesses ⚷21, 22**

The forfeiture provided by statute requiring that witness disobeying subpœna forfeit $100 and damages to party aggrieved is in addition to the punishment for contempt authorized by statute permitting court to punish as a contempt noncompliance with order requiring attendance under a subpœna and no election between them is required, so that either or both under proper circumstances may be enforced for the same disobedience. Code Civ.Proc. §§ 1991, 1992.

**4. Witnesses ⚷22**

The statute requiring that witness disobeying subpœna forfeit $100 and damages to party aggrieved authorizes recovery of forfeiture for disobedience of subpœna though no court order directing attendance under the subpœna has been issued. Code Civ. Proc. § 1992.

**5. Witnesses ⚷22**

One seeking to recover forfeiture or damages under statute requiring that witness disobeying subpœna forfeit $100 and damages to party aggrieved must show that he has suffered some actual damage from the disobedience. Code Civ.Proc. § 1992.

**6. Witnesses ⚷22**

The fact that one seeking to recover forfeiture and damages under statute requiring that witness disobeying subpœna forfeit $100 and damages to party aggrieved has not yet discharged his liability for any of expenses claimed as damages does not preclude recovery. Code Civ.Proc. § 1992.

**7. Witnesses ⚷22**

The disobedience of subpœna commanding attendance before notary public for taking of deposition was not a "breach of contract" but was a "tort," and the applicable rule of damages recoverable by party aggrieved was that applicable to actions in tort under which recovery might be had for amount of liability, incurred but not paid, for reasonable and necessary expenses caused by wrongful act complained of. Code Civ. Proc. § 1992.

[Ed. Note.—For other definitions of "Breach of Contract" and "Tort," see Words & Phrases.]

**8. Witnesses ⚷22**

The right conferred on aggrieved party by statute requiring that witness disobeying subpœna forfeit $100 and damages to party aggrieved may be asserted as soon as the disobedience occurs without awaiting and regardless of the outcome of the action in which the witness is subpœnaed. Code Civ. Proc. § 1992.

**9. Judgment ⚷590(1)**
**Witnesses ⚷22**

A plaintiff who was entitled as an aggrieved party to recover forfeiture and damages from adverse party for noncompliance with subpœna demanding attendance for taking of deposition in action pending between the parties could recover in action for forfeiture and damages items of damages which were allegedly proper items of cost in action in which deposition was being taken, but double recovery would not be permitted and recovery as damages would preclude recovery as costs in other action. Code Civ.Proc. §§ 1032, 1992.

**10. Witnesses ⚷22**

The testimony which motorist might give by deposition in action against her by bicyclist for personal injuries would be "material testimony," and motorist could not avoid forfeiture for noncompliance with subpœna requiring attendance for taking of deposition on ground that it was not shown that she could give "material testimony." Code Civ.Proc. §§ 1992, 2021, subd. 1.

[Ed. Note.—For other definitions of "Material Evidence or Testimony," see Words & Phrases.]

---

Appeal from Municipal Court of City of Los Angeles; Frank G. Tyrrell, Judge.

Action by Eldon Newell Church, etc., against Marie Payne, to recover penalty and damages for disobedience of a subpoena. Judgment for defendant, and plaintiff appeals.

Reversed and cause remanded for new trial.

A. V. Falcone, of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondent.

SHAW, Presiding Judge.

Plaintiff seeks to recover from defendant the penalty and damages provided in section 1992 of the Code of Civil Procedure, for disobedience of a subpoena by a witness. The subpoena in question commanded the defendant's attendance before a notary public for the taking of her deposition in behalf of plaintiff in a civil action then pending in the Superior Court between the same parties. It is not disputed here that the subpoena was regularly issued and served, or that defendant failed to attend as directed thereby. Defendant's principal contention in support of the judgment in her favor is that to fix a liability upon her for the penalty and damages sued for there must be a report to the court of her failure to attend and an order of court, made under section 1991 of the Code of Civil Procedure, directing her to attend. In this case there was no such order, although defendant's failure to attend was reported to the court, but we conclude that plaintiff's action can be maintained without it.

Decision of the questions presented requires a consideration of sections 1991 and 1992 of the Code of Civil Procedure, which read as follows:

§ 1991: "Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena. When the subpoena, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpoena; and the witness must not be punished for any refusal to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to so answer or subscribe and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision three of section nineteen hundred and eighty-six, may report any such disobedience or refusal to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court."

§ 1992: "A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action."

[1, 2] Section 1992 is doubtless a penal statute, as far as the forfeiture is concerned; but the rule that such statutes are to be strictly construed, even where applicable, "does not mean that when the intent and object of the law is plain such object may be defeated by an overnice construction." Eyre v. Harmon, 1891, 92 Cal. 580, 588, 28 P. 779, 781. Moreover, section 1992 is a part of the Code of Civil Procedure, and is therefore, by the terms of section 4 of that code, not subject to the rule of strict construction, but is "to be liberally construed, with a view to effect its objects and to promote justice."

[3] On a mere reading of sections 1991 and 1992, it is apparent that each of them covers the subject of disobedience to a subpoena, that is, failure to attend as required thereby, and provides a penalty for such disobedience. It is also obvious that the forfeiture provided by section 1992 is in addition to the punishment for contempt authorized by section 1991; that is, no election between them is required, but either or both under proper circumstances may be enforced for the same disobedience. See Lezinsky v. Superior Court, 1887, 72 Cal. 510, 512, 14 P. 104. Section 1992 does not, at least expressly, prescribe any condition to the forfeiture except disobedience to a subpoena, which is the same condition mentioned in the first sentence of section 1991. Defendant contends, however, that the forfeiture is subject to the same further conditions which have been found in section 1991 by judicial decision, citing Merrill v. Superior Court, 1917, 33 Cal.App. 55, 164 P. 340, where it was held that a witness subpoenaed to attend out of court cannot be punished for non-attendance as a contempt unless his failure to attend has been reported to the court and the court has ordered him to attend. According to defendant's view, the effect of this decision is that under section 1991 there is no "disobedience to a subpoena" until the witness has disobeyed an order of court directing him to attend, and she argues that the same meaning should be applied to the substantially identical language of section 1992. But this decision does not undertake to define the phrase "disobedience to a subpoena." It holds merely that a disobedient witness may not be punished for contempt until he has disobeyed an order of the court, and is based on the last sentence of section 1991. Its effect is merely that section 1991, as it now reads, requires two contumacious acts by a witness before he can be punished for a contempt; first, "disobedience to a subpoena," and, second, "refusal or neglect to comply with such order" of the court.

Section 1992, as written, requires only the first of these acts as a condition of the forfeiture. This was also the only condition imposed for a contempt punishment by the terms of section 1991 as first enacted in 1872, for it then read as follows: "Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out." While section 1991 was in this form, it was held that a witness who failed to attend for the taking of his deposition, after being duly subpoenaed, could be punished for contempt without any order of court directing his attendance (Burns v. Superior Court, 1903, 140 Cal. 1, 2, 3, 73 P. 597), and it was further declared that the remedy provided by section 1992 was not dependent on proceedings under section 1991. Lezinsky v. Superior Court, supra, 1887, 72 Cal. 510, 512, 14 P. 104.

In 1907 section 1991 was amended by inserting in it the language requiring an order of court before a witness can be punished for contempt. No such provision was added to section 1992, which still stands as it was when first adopted in 1872. At the time of the enactment of section 1992 there was clearly ~~no~~ basis for the construction we are now asked to put upon it. In Burns v. Superior Court, supra, 1903, 140 Cal. 1, 12, 13, 73 P. 597, it was held that the part of section 1991 as it then stood purporting to give the power to punish for contempt of court to ministerial officers taking depositions was invalid. This decision suggests a sufficient reason for the amendment of section 1991 in 1907. Since this reason would have no application at all to section 1992, no corresponding amendment was made to that section, and there is no ground for reading the amendment of section 1991 into section 1992 by any sort of implication. No change having been made in the words of section 1992, even when legislative attention was turned to the subject, its meaning remains unchanged.

[4, 5] For the foregoing reasons we hold that the defendant disobeyed the subpoena, within the meaning of that term as used in section 1992, and that proceedings against her under section 1991 were not necessary to fasten a liability upon her under section 1992. Before plaintiff can recover either the forfeiture or the damages mentioned in said section 1992, he must also show that he is a "party aggrieved," that is, that he has suffered some actual damage from the disobedience. Nolan v. Grider, 1901, 135 Cal. 49, 67 P. 9; Lombard v. Smith, 1900, 37 Or. 23, 60 P. 388, 707. Here there was allegation and proof of damages sufficient to support plaintiff's action.

[6, 7] The fact that plaintiff has not yet discharged his liability for any of the expenses claimed as damages by payment does not debar him from recovering them as damages. Defendant's disobedience to the subpoena was not a breach of contract, but a tort (see 62 Corpus Juris 1091), and the rule of damages here is that applicable to actions in tort, by which a plaintiff may recover the amount of a liability, incurred but not paid, for reasonable and necessary expenses caused by the wrongful act complained of. Nelson v. Kellogg, 1912, 162 Cal. 621, 623, 123 P. 1115, Ann.Cas.1913D, 759.

[8, 9] Defendant objects to the items of damages claimed in this case on the ground that they are proper items of costs in the action in which the deposition was being taken. Such damages could be recovered from the witness as costs only where the witness is the adverse party to the action in which he is subpoenaed; but even in such a case the possibility of such recovery is no bar to a separate action. The purposes of section 1992 and of that providing for recovery of costs are not the same. Section 1992 confers on the aggrieved party a right which may be asserted and enforced as soon as the disobedience occurs, without awaiting, and regardless of, the outcome of the action. The witness by disobeying the subpoena has violated the rights of the summoning party to take his testimony and has flouted the law requiring him to attend. For that conduct section 1992 imposes a present liability. Section 1032 of the Code of Civil Procedure, providing for costs, is operative only at the conclusion of the action, and awards costs only to the successful party in such an action as this, hence putting a premium on the witness' disobedience, should it operate to defeat the other party. Of course, the rule against double recovery would prevent plaintiff herein from recovering the items in question as costs in the other action after obtaining judgment for them here, and vice versa; and if by some chance he should recover them in both actions, one payment would suffice to satisfy both judgments to that extent.

[10] It is stated in Nolan v. Grider, supra, 1901, 135 Cal. 49, 67 P. 9, that the forfeiture provided by section 1992 cannot be recovered unless it is shown that the witness can give material testimony. As applied to the adverse party, this seems to ignore the right of a litigant to take the deposition of the adverse party in preparation for trial. See section 2021, subd. 1, Code of Civil Procedure; Wissman v. Cabaniss, 1917, 34 Cal.App. 487, 168 P. 150. Such a procedure is a sort of statutory discovery, its purposes being to ascertain whether the party can give material testimony and, if so, what that testimony will be. However, in this case the materiality of the testimony of defendant sufficiently appears. The action in which she was to be examined was one brought against her for personal injuries received by plaintiff, who was riding a bicycle, from a collision with an automobile driven by

defendant, and plaintiff desired to question her in regard to this accident. Her testimony on this subject would be material.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial, appellant to recover his costs of appeal.

BISHOP and SCHAUER, JJ., concur.

33 Cal.App.2d 245

## GOODSPEED et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6011.

District Court of Appeal, Third District, California.

July 8, 1939.

Rehearing Denied Aug. 7, 1939.

Hearing Denied Sept. 6, 1939.

**1. Appeal and error 🔑1008(1)**

In action to recover damages for fraudulent representations inducing plaintiffs to purchase canal company's stock, whether plaintiffs received water under and below its reasonable value as part consideration for stock contracts was fact question for trial court.

**2. Costs 🔑241**

Where plaintiffs prevailed on appeal in respect to establishing cause of action, though judgment for them was reversed on limited issue of damages, each party to appeal should pay his own costs thereon.

**3. Public service commissions 🔑19½**

Parties induced to purchase canal company's stock by fraudulent representation that it was mutual water company, instead of public utility, properly brought action in Superior Court to recover damages, as Railroad Commission had no jurisdiction to hear and determine issue involved. St.1915, p. 165, § 73(a).

**4. Judgment 🔑547**

Proceedings taken by Railroad Commission to compensate parties purchasing canal company's stock in reliance on fraudulent representation that it was mutual water company, instead of public utility, by concessions in water rates, would not deprive them of right of action based on tort.

**5. Appeal and error 🔑1008(1)**

In action to recover damages for fraudulent representations inducing plaintiffs to purchase canal company's stock, whether plaintiff knew that representations were false when they purchased stock was fact question for trial court.

**6. Appeal and error 🔑1011(1)**

In action to recover damages for fraudulent representations inducing plaintiffs to purchase canal company's stock, trial court's finding on conflicting evidence that plaintiffs did not know that representations were false when they purchased stock is final in Court of Appeal.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

On petitions for rehearing.

Original opinion modified, and petitions denied.

Prior opinion, 91 P.2d 623.

Ware & Ware, of Chico, for plaintiffs, respondents and appellants.

Thos. J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, and Jerome D. Peters, of Chico, for defendants, respondents and appellants.

PER CURIAM.

Petitions for rehearing have been filed by plaintiffs and defendants, both parties having appealed.

[1] Appellants (plaintiffs) state that some of the language used in our opinion might be construed as holding that, as a matter of law, plaintiffs received water under and below its reasonable value, as part consideration for the stock contracts. We do not want to be understood as so deciding. That matter was and is strictly one of fact, to be determined by the trial court. These appellants also contend that what we had to say upon the measure of damages (to be applied in the event a retrial is had upon that issue), is no longer the law, section 3343 of the Civil Code having been enacted during the course of the trial. It is contended that said action is applicable to the case. We have concluded that the discussion mentioned was not necessary to the decision.

[2] Plaintiffs contend that the court should order each party to the appeal to pay his own costs. We believe that the point is well taken. While the action was

reversed, it was upon the limited issue of damages. Plaintiffs prevailed in respect to establishing a cause of action. It would therefore seem fair to order each party to pay his own costs.

[3] Turning to the petition filed by defendant, we find nothing therein which, in our opinion, justifies any relief to it on rehearing. The railroad commission had no jurisdiction to hear and determine the issue involved here, and any attempt on the part of the commission to thus act, would be void. As we held in our opinion, there was evidence to sustain the finding that the Canal Company was not a bona fide mutual water company, but the mere creature of the Power Company,—a public utility. In effect (and in law) plaintiffs were dealing with the Power Company. The following provision of the Public Utility Act, section 73, subdivision (a), clearly confirms the view that plaintiffs pursued their remedy in the proper forum: "An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person". St. 1915, p. 165.

[4] No proceeding taken by the commission to compensate plaintiffs by concessions in water rates would deprive them of their right of action based on a tort. If plaintiffs took advantage of any such concession and any special rates, the proper course would be for the trial court to credit the difference between the amount of such special rates and the regular rates against the amount paid for the stock. If, on the acceptance of any preferential rate based upon these facts, the defendants waived their rights (as plaintiffs state), the matter is of no consequence. This is a matter for the trial court on a retrial of the issue of damages.

[5, 6] The question of whether or not plaintiffs knew that the representations were false when the stock was purchased was one of fact for the trial court. The evidence is conflicting on this issue—plaintiffs testified that they had no such knowledge—and such finding is final in this court.

The other points raised have to do with the measure of damages. As we have stricken from the opinion what we had to say upon that subject, the question is eliminated, and it is now a matter for the trial court, in the event of a retrial of the matter of damages.

It is ordered that the opinion be modified as specified above, and that the petitions for rehearing be denied.

---

33 Cal.App.2d 474

**HUBBARD v. MT. RAYMOND MINING CO. et al.**

**SMITH et al. v. SAME.**

**Civ. 6210.**

District Court of Appeal, Third District, California.

June 23, 1939.

As Modified July 19, 1939.

Hearing Denied Aug. 21, 1939.

See 93 P.2d 95.

**1. Venue 🔑2**

In suit to determine interest in realty, wherein defendants, who were residents of county in which suit was brought, were served with complaint, answered, and filed a counterclaim, whereafter complaint was served on residents of another county who with the cross-defendant appeared by demurrers and moved that place of trial be changed to county of their residence, question of venue was to be determined from examination of relief sought in complaint, as against contention that court was required not only to examine the complaint but entire record as it stood at time motion for change was filed. Code Civ.Proc. § 395 et seq.

**2. Venue 🔑5(3)**

In suit on complaint alleging plaintiff's ownership of interest in realty in county in which suit was brought and that defendants asserted adverse interests therein and that plaintiff's right should be quieted, motion of defendants for change of venue to county of their residence was properly denied since complaint on its face appeared to be action to determine interest in real property triable in county in which realty was located.

**3. Venue 🔑62**

Motion of two of several defendants for change of venue was properly refused where all of defendants did not join in motion.

**4. Appeal and error** ⟹1024(3)

In suit to determine interest in realty in which complaint alleged defendants were asserting an adverse interest, denial of motion of two of defendants for change of venue which was supported by affidavits that other defendants were unnecessary and improper parties defendants joined merely to deprive moving defendants of their right to change of venue would not be disturbed on appeal since affidavits merely created conflict with allegations in verified complaint.

**5. Venue** ⟹72

The allegations of a complaint are proof against assault on ground that they are sham and frivolous on motion for change of venue if they do more than shadow forth the semblance of a cause of action.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action to determine interest in real property by H. H. Hubbard against Mt. Raymond Mining Company, R. L. Bradford, J. Wesley Smith, L. M. Bradford, J. J. Hurlbert and others, wherein defendant J. Wesley Smith and L. M. Bradford filed a cross-complaint. From an order denying their motion for a change of venue to the county of their residence, defendants Mt. Raymond Mining Company and R. L. Bradford appeal.

Affirmed.

Robert E. Hatch and Louis Bulasky, both of San Francisco, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondent Hubbard.

Hubert Wyckoff, Jr., of San Francisco, for respondents Smith and Bradford.

PER CURIAM.

[1] This is an appeal from an order denying defendants' motion for change of venue to the county of their residence. At the time the demand for change of place of trial was made the record consisted of the complaint, an answer and a cross-complaint by two of the defendants, and demurrers interposed by the three appellants herein, to the complaint and to the cross-complaint, together with the moving papers asking that the place of trial be changed from the county of Madera to the city and county of San Francisco.

The record further discloses the complaint was filed July 6, 1936, and served upon defendants J. Wesley Smith and L. M. Bradford, concededly residents of the County of Madera. On July 10th these defendants answered, admitting all of the allegations of the complaint, including the validity of the lease set forth in the complaint, and at the same time filed a cross-complaint asserting an equitable ownership in the mining claims described in the lease, because of an alleged fraud committed by certain of the other defendants.

Thereafter the complaint was served upon defendants Mt. Raymond Mining Company, a corporation, and R. L. Bradford, who with a cross-defendant, H. M. Cardiser, appeared by demurrers and moved that the place of trial be changed from the County of Madera to their residence, the City and County of San Francisco.

Upon these facts appellants contend that the court, in determining the question of venue, was required not only to examine the complaint, but the entire record as it stood at the time the motion for the change was filed.

With this we cannot agree. It is the relief sought by the plaintiff in his complaint to which the trial court must direct its attention upon such a motion as here made.

Direct authority for this statement seems to be lacking, but consideration of Section 395 of the Code of Civil Procedure, et seq., and the following cases would lead to such conclusion. Hellman v. Logan, 148 Cal. 58, 82 P. 848; Quint v. Dimond, 135 Cal. 572, 67 P. 1034; Bowers v. Modoc Land, etc., Co., 117 Cal. 50, 48 P. 979.

In the complaint it is alleged that plaintiff Hubbard was the owner and possessor "of a certain leasehold interest, to-wit: an estate for the term of ten years" to certain mining claims located in the county of Madera; that the defendants claim and assert an adverse interest therein, and that plaintiff's rights should be quieted.

[2, 3] This complaint upon its face would appear to be an action in the usual form to determine an interest in real property, and therefore triable in the county of Madera. It would also appear that inasmuch as all of the defendants did not join in the motion to change the place of trial, the court properly refused to grant the motion.

[4] Appellants alleged in their affidavits that the defendants J. Wesley Smith and L. M. Bradford, residents of Madera county, were unnecessary and improper parties defendants joined merely to de-

prive the other defendants of their right to a change of venue. At most the affidavits merely created a conflict with the allegations in the verified complaint, which conflict the trial court resolved against appellants, and that ruling should not be disturbed. Lakeshore Cattle Co. v. Modoc Land & Livestock Co., 108 Cal. 261, 41 P. 472; Pacific Coast Automobile Ass'n v. Ahlf, 115 Cal.App. 21, 300 P. 841; Mitchell v. Kim, 42 Cal.App. 111, 183 P. 368.

[5] As stated in McClung v. Watt, 190 Cal. 155, 211 P. 17, 20, the allegations of the complaint upon a motion for a change of venue "did no more than shadow forth the semblance of a cause of action, they would be proof against assault upon the ground that they were sham and frivolous". See, also, Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980. Also it would appear that all of the defendants having failed to join in the motion to change the place of trial, and that the action set forth in the verified complaint is an action affecting real property, the trial court was correct in denying the motion to change the place of trial.

For the foregoing reasons, the order and judgment are affirmed.

33 Cal.App.2d 511

## MOQUIN v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 12233.

District Court of Appeal, Second District, Division 1, California.

June 27, 1939.

**1. Certiorari 🔑68**

The application of doctrine that findings of triers of fact on conflicting evidence are conclusive is limited to cases where conflict is substantial and real, and not fanciful or fictitious.

**2. Workmen's compensation 🔑1357**

The burden is on applicant for compensation to establish fact of injury, but where injury is conclusively proven, but employer contends it is not a new one and did not occur on date or under circumstances alleged, burden is on employer to prove his contentions in such regard.

**3. Workmen's compensation 🔑1704**

While question of weight to be given to testimony of witnesses is for Industrial Accident Commission, commission may not arbitrarily disregard testimony of witness where there is no inherent improbability in testimony taken as a whole.

**4. Workmen's compensation 🔑1947**

Where evidence established that employee suffered severe strain with resultant immediate pain, observance by fellow employees of physical infirmity of employee, conversation between employee and other employees concerning happening of accident in course of employment, continuance of pain and examination by physician within week after commencement of pain and physical disability, and there was expert testimony that hernia condition was of recent origin, award of Industrial Accident Commission denying compensation was annulled, notwithstanding alleged discrepancies in testimony of employee and fellow employee.

**5. Workmen's compensation 🔑11**

The Workmen's Compensation Law is founded on sound public policy and with objective of protecting workmen against economic insecurity.

**6. Workmen's compensation 🔑1090**

The Workmen's Compensation Law favors payment of compensation, and mere conjecture of Industrial Accident Commission that injury may not be compensable should not militate against the employee's receiving such benefit.

◆

Proceeding under the Workmen's Compensation Act by Clarence J. Moquin, employee, opposed by the Western Auto Supply Company, employer, and the Lumbermen's Mutual Casualty Company, insurance carrier. To review an award of the Industrial Accident Commission in favor of employer and insurance carrier, employee brings certiorari.

Award annulled.

Edward J. Trevey, of Santa Barbara, for petitioner.

Everett A. Corten, of San Francisco, for respondent.

WHITE, Justice.

This cause is before us upon the application of the above-named petitioner to review an award made by the Industrial Accident Commission in favor of the Western Auto Supply Company and Lumbermen's Mutual Casualty Company.

The record shows that the petitioner was employed as an appliance service man by Western Auto Supply Company, at Santa Barbara, California; that on July 29, 1938, while acting in the course of his employment, petitioner in company with a fellow employee was delivering an electric refrigerator; that while such refrigerator was being carried upstairs in the residence of the purchaser thereof petitioner, according to his testimony, slipped, and the weight of the refrigerator was thrown in its entirety upon one of his legs, causing petitioner to sustain a hernia, a cure of which was finally effected through surgery. There is in the record evidence that petitioner completed the delivery and installation of the refrigerator and when he thereafter straightened up he felt a sharp pain on the left side of his body up to the waist; that when he was walking back to the delivery truck his coworker noticed that petitioner was limping and inquired of him as to the cause thereof, to which the latter replied that he had strained himself when he lost his footing while carrying the refrigerator upstairs. Petitioner's testimony in this regard was corroborated at the hearing before the commission by his fellow employee. The Santa Barbara store manager of petitioner's employer testified that he had observed petitioner at his work every day, and that he did not observe any evidence of physical disability prior to July 29, but that when petitioner returned to the store shortly before the noon hour, the manager observed petitioner limping and asked what was the matter, to which inquiry petitioner related the facts hereinabove narrated. The store manager further testified that he suggested petitioner see a doctor, but the latter thought he would be all right and did not think the injury was serious. According to petitioner, while he remained on the job, his pain continued, and while taking a bath several days later he noticed a lump in his groin. Reporting this fact to the store manager, he was directed to see a doctor, and did consult his own physician on the 5th of August, one week following the injury. This doctor's examination revealed a left indirect inguinal hernia which extended to the external inguinal ring, but not through it. Surgery was recommended. This information was communicated to the store manager, who relayed the same to the company, and petitioner was later directed to another physician, whose examination of petitioner revealed the same condition found by his own doctor, and a recommendation for an operation was made to the insurance carrier. On August 22 the insurance carrier informed petitioner of its refusal to assume any liability in the premises.

Petitioner testified positively that he had been under no physical disability nor had he incurred any strain or observed any hernial condition on his body prior to July 29. The record contains a letter from still another physician who had fully examined petitioner some six months prior to the date of the injury, in connection with an application for an insurance policy, and such physician stated that at the time there was no evidence of hernia. Petitioner's physician, whose experience in the practice of medicine extended over twenty-four years, during which time he handled several hundred hernia cases, testified before the commission that it was his positive opinion that the hernia condition revealed by the examination of August 5 was of very recent origin. It may be said that no testimony whatever was introduced to show that petitioner was suffering from any physical disability prior to July 29.

Respondent commission rests its case upon the established doctrine that the commission was the sole and exclusive judge of the credibility of witnesses, and that because of certain discrepancies between the testimony of petitioner given at the hearing held by the commission on his application for adjustment of claim and certain other facts and circumstances which were developed in the evidence, it was within the sole province of the commission to determine what credit and weight should be given to the testimony, and that this court is without authority to control a finding or conclusion arrived at by the commission denying credence to witnesses unless it appears that there were no matters or circumstances which at all impaired the accuracy of the testimony. Let us therefore now consider what the commission denominates as "material discrepancies" in the testimony given on behalf of petitioner at the hearing. It appears that at the hearing before the commission there were introduced in evidence statements taken by the insurance company from petitioner and from Milton Nickelson, his fellow employee who accompanied the former on the date of the alleged injury in connection with the delivery of the refrigerator. In the statement of the coemployee, taken August 16, 1938, he stated that "about three days after this" (the occasion of carrying the refrigerator) "Mr. Moquin told me he thought he had hurt himself when he was carrying the refrigerator", while at the hearing before the commission the witness, Nickelson, testified that he thought petitioner may have told him when they got back to the store that he, petitioner, had strained himself on the refrigerator. And again, on cross-examination, the witness admitted that his written statement in this respect was correct. However, an examination by us of the testimony indicates that the aforesaid statement of the witness Nickelson was preceded by the following: "As we were walking back to the truck I noticed that Mr. Moquin was limping and I asked him what he was limping for. He said he had slipped going up the step. He said his leg hurt him. He had not been limping prior to taking the refrigerator to this residence. We did not discuss it further, but I noticed Mr. Moquin was limping the remainder of the day." This, to our minds, constitutes a corroboration rather than an impeachment of the testimony given by the witness.

Respondent commission further contends that at the hearing before it petitioner stated that he told Nickelson that he had strained himself carrying the refrigerator, and that this statement was made very soon after the occurrence, while on cross-examination he admitted that the statement he had made to the insurance company's representative, wherein it is alleged he fixed a different time for telling Nickelson, was correct. We find no willful design to deceive, for it appears that there was more than one conversation between petitioner and his fellow employee.

It is next contended by the commission that Dr. Horace F. Pierce, the physician to whom petitioner had gone on August 5, 1938, testified that in petitioner's first statement to him the latter claimed that he had strained himself while carrying some storage batteries, while later on he claimed to have been injured while carrying a refrigerator. The doctor's testimony in that regard is as follows:

"Q. Doctor, at the time you examined Mr. Moquin, did he give you any history of this hernia occurring, or allegedly occurring in the course of his employment? A. I think I can remember that. When he first came to me he said he thought that he was carrying storage batteries, but he was not sure, and then at a later time or the same visit, I have forgotten, he remembered that it must have occurred at the time that he was lifting that ice box.

"Q. Was that the first time that you saw him that he told you that? A. I think the first time he saw me he thought it was due to the storage battery, but I am not positive on that point."

[1–3] Conceding that reviewing courts may not invade the field of the fact-finding body, and that under well settled rules where a conflict in the evidence exists the findings of the triers of fact are conclusive, it is nevertheless equally well settled that the application of the foregoing doctrine is limited to cases where the conflict is substantial and real, and not fanciful or fictitious. We recognize the rule that the burden is upon the applicant to establish the fact of injury; but nevertheless, where, as here, the injury is conclusively proven, but the employer contends it is not a new one and did not occur on the date or under the circumstances alleged, the burden is on such employer to prove his contentions in that regard. While it is true the question of the weight to be given to the testimony of witnesses is one for the commission to determine, the latter may not arbitrarily disregard the testimony of a witness where there is no inherent improbability in the testimony taken as a whole. The facts in the case at bar are very similar in many respects to the situation prevailing in the case of Singer v. Ind. Acc. Comm., 105 Cal.App. 374, 287 P. 567, 568, wherein the court says: "While it is true that the burden is upon the applicant to establish the fact of injury, still, where the injury is proven, and the employer contends that it is not a new one, but is the result of a former accident, the burden is upon him to prove his contentions. Delay of a few days, as here, in reporting the accident, does not establish nonexistence of a new injury. A workman, as most frequently happens, is unfamiliar with the development of injuries of this character and certain symptoms mean little or nothing to him unless they are objective and definitely pronounced. In such a situation the employer is bound by the surrounding facts and circumstances of the case, and where the applicant testifies in relation thereto and his story of how the accident happened is reasonable and not disputed, and such testimony conclusively shows an injury adequately accounted for, it is not overcome by the fact that it might, by some possibility, have resulted from some other cause not shown to exist. While awards cannot be based upon mere guess or conjecture, here there was proof that the origin of the hernia was recent, and when suffered was accompanied by pain; that it was immediately preceded by accidental strain; that it did not previously exist, and the rupture and strain were in close relation. This evidence, without more, is sufficient to compel a finding that the suffered hernia was proximately caused by the accident as testified to. * * * So here, the undisputed facts are sufficient to make a reasonable man conclude in the applicant's favor upon the vital points, and is adequate to prove his case. It was therefore binding upon the commission, and the latter could not, upon mere conjecture or guesswork, deny compensation." See, also, Bussey v. Ind. Acc. Comm., 26 Cal.App.2d 211, 79 P.2d 169.

[4] To epitomize the evidence in the case before us, it establishes as facts that petitioner suffered a severe strain with resultant immediate pain; observance by fellow employees of physical infirmities on the part of petitioner; conversations between petitioner and other employees concerning the happening of the accident in the course of employment; continuance of pain and examination by a physician within a week after the commencement of such pain and physical disability; and finally, expert testimony that the hernia condition was of recent origin.

It requires no citation of authority for the statement that these facts established by the evidence may not be disregarded by the commission. The "discrepancies", if such they may be called rather than "inadvertences", in the testimony of petitioner and one of his fellow employees, were insufficient to destroy the credibility of these two witnesses and certainly insufficient to destroy the force of the facts proved by other witnesses and circumstances that the suffered hernia was proximately caused by the accident claimed to have occurred on July 29, 1938.

[5,6] The law under which the respondent commission functions in cases like this is founded upon sound public policy and with the objective of protecting, in a proper case, a workman against economic insecurity. This law favors the payment of compensation, and mere conjecture on the part of the commission that the injury may not be a compensable one should not militate against the employee's receiving this benefit. Here the facts are such as to reasonably support no conclusion other than that the hernia was proximately caused by an accident arising out of and in the course of petitioner's employment.

The award is annulled.

We concur: YORK, P. J.; DORAN, J.

33 Cal.App.2d 564

**CHRISTAL et al. v. POLICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.**

**Civ. 11003.**

District Court of Appeal, First District, Division 2, California.

June 29, 1939.

Hearing Denied Aug. 28, 1939.

**1. Municipal corporations ⇨185(1)**

City police officers, exercising constitutional privilege of refusing to testify before grand jury during investigation to determine whether they were guilty of criminal activities, cannot insist on retaining their position.

**2. Municipal corporations ⇨189(1)**

Among police officers' duties are those of preventing commission of crime, of assisting in detection of crimes and disclosing all information known to them which may lead to lawbreakers' apprehension and punishment.

**3. Municipal corporations ⇨189(1)**

Police officers, acquiring knowledge of facts tending to incriminate any person, owe duty to disclose such facts to their superiors and testify freely concerning them when called on to do so before duly constituted court or grand jury.

**4. Municipal corporations ⇨189(1)**

A police officer's refusal to disclose pertinent facts within his knowledge, tending to incriminate any person, when called on to testify concerning them before court or grand jury, is violation of duty, though such disclosure may show or tend to show that officer himself has engaged in criminal activities.

**5. Witnesses ⟹293½, 306**

The constitutional privilege of refusing to testify as to facts tending to incriminate witness may be exercised by all persons, including police officers, in any proceeding, civil or criminal.

**6. Municipal corporations ⟹176(3)**

City police officers, violating their duty by refusing to answer questions as to facts tending to incriminate them before grand jury, had no constitutional right to remain police officers.

**7. Municipal corporations ⟹185(1)**

Police officers' violation of duty by refusing to answer questions as to facts tending to incriminate them before grand jury constitutes cause for their dismissal, even in absence of specific police department rule requiring such officers to testify before grand jury or relating to conduct unbecoming an officer.

**8. Municipal corporations ⟹185(1)**

The right of public servant, such as city police officer, to retain his office or employment should depend on his willingness to forego his constitutional rights and privileges to extent that exercise thereof may be inconsistent with performance of his duties.

**9. Municipal corporations ⟹185(7)**

Complaints, verified before deputy county clerk and police chief of city and county of San Francisco, in proceedings before police commission thereof to dismiss police officers, were duly verified before authorized officers. Pol.Code, §§ 343, 1028; Charter of City and County of San Francisco, § 4.

**10. Municipal corporations ⟹185(5)**

Allegations of, and statements in excerpts from newspaper articles in, dismissed city police officers' affidavits that one of police commissioners had publicly announced that such officers' failure to testify frankly before grand jury during investigation to determine whether they were guilty of criminal activities would be considered unofficerlike conduct, that he had been active in amending police department's rules to require specifically that all officers testify without reservation as to all matters under investigation, and that he had made statements showing police commission's intent to enforce such rule strictly and take disciplinary action against officers asserting constitutional privilege to refuse to testify, did not show such commissioner's bias and prejudice resulting in denial of fair and impartial trial to affiants.

**11. Municipal corporations ⟹185(1)**

City police officers' refusal to testify before grand jury during investigation to determine their guilt of criminal activities constituted "conduct unbecoming an officer" within police department rule authorizing dismissal of police officers guilty of such conduct.

[Ed. Note.—For other definitions of "Conduct Unbecoming Member or Officer," see Words & Phrases.]

**12. Municipal corporations ⟹185(1)**

City police officers actually before grand jury were subject to dismissal for refusal to testify during investigation to determine their guilt of criminal activities, regardless of whether they were legally subpœnaed.

**13. Municipal corporations ⟹176(3)**

A city police department rule, requiring police officers to testify without reservation in grand jury investigations, as well as before courts, is not unconstitutional as it imposes no new duties on such officers and does not deprive them of right to exercise constitutional privilege of refusing to testify on ground of self-incrimination.

**14. Municipal corporations ⟹185(1, 5)**

The police commission of city and county of San Francisco had jurisdiction and power to dismiss police officers, refusing to testify before grand jury during investigation to determine whether they were guilty of criminal activities, on grounds of conduct unbecoming an officer and disobedience of orders.

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Proceeding by Edward Christal and others for a writ of review and writ of mandate to annul an order of the Police Commission of the City and County of San Francisco dismissing petitioners from their positions as police officers and compel the commission to reinstate them. From a judgment affirming the order and denying the petition for writ of mandate, petitioners appeal.

Affirmed.

J. Joseph Sullivan and John Francis O'Dea, both of San Francisco, for appellants.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

SPENCE, Justice.

Appellants were formerly police officers in the City and County of San Francisco. Said appellants and other former police officers filed a petition in the superior court for a writ of review and a writ of mandate. They sought thereby to obtain the annulment of the action of the Police Commission of said City and County in dismissing said officers and to compel said Commission to reinstate them in their former positions. The writ of review was issued, a return was made, and an answer was filed. No evidence was introduced in the proceedings in the trial court, and the cause was submitted upon the records of the Police Commission as contained in the return. The trial court entered its judgment affirming the action of the Police Commission in dismissing said officers and denying the petition for a writ of mandate. Appellants, being four of the eleven original petitioners, have appealed from said judgment of the trial court.

This controversy is the aftermath of a certain grand jury investigation conducted in San Francisco in 1936. In their petition in the trial court, petitioners alleged that the purpose of said investigation was to ascertain "whether petitioners or any of them as members of said police department or otherwise had committed or now are committing any felony or other crime, and particularly whether petitioners or any of them had been or now are guilty of corruption or had received or now are receiving bribes or gratuities from any persons engaged in or connected with gambling, prostitution and other unlawful activities * * * and said grand jury * * * was further investigating the assets and income of each petitioner to determine whether the same was obtained by reason of the commission of any felony or other crime by each petitioner and particularly whether said assets and income were derived by each petitioner as the result or fruits of felonious or other criminal bribery, corruption, conspiracy to extort or receive from unlawful sources or from persons engaged in unlawful activities, particularly gambling and prostitution".

It was further alleged that petitioners were subpoenaed to appear before said grand jury on various dates during said investigation and that, "Each of your petitioners did refuse to produce his said private records before said grand jury and did refuse to answer questions before said grand jury concerning his assets and income and did refuse to testify concerning his acts and conduct when inquiry was made concerning the same for the purpose of discovering whether each petitioner had committed or was guilty of any of the acts or things, the discovery of which was the object of said grand jury investigation as aforesaid".

Thereafter charges were filed against said petitioners before the Police Commission. In each case the heading of the charges shows that the petitioner was charged with "Conduct unbecoming an Officer and Disobedience of Orders". The specific facts alleged in each case involved the refusal of the officer to testify as above set forth. The hearings were had before the police commissioners, and the officers were dismissed.

[1] Several incidental points are raised by appellants on this appeal, but the main question involved is whether appellants, while holding positions as police officers, could exercise the constitutional privilege of refusing to testify before the grand jury under the circumstances and still insist upon retaining their positions as police officers. We are of the opinion that they could not, and we have reached this conclusion without resort to a consideration of the violation of the specific rule of the police department adopted in May, 1936, which rule will be hereinafter discussed.

The nature of the constitutional privilege to which reference has been made was discussed in two recent decisions of this court involving two of the officers who were petitioners in these proceedings in the trial court. In re Lemon, 15 Cal.App.2d 82, 59 P.2d 213; In re Hoertkorn, 15 Cal.App.2d 93, 59 P.2d 218. We need not further discuss the nature of said privilege here as it is conceded by all that said officers could exercise that privilege in any proceeding. We are concerned here only with the result of the exercise of such privilege, by those holding the positions of police officers, in an investigation by which it was sought to determine whether such officers had been guilty of criminal activities in connection with their duties as police officers.

[2-4] The duties of police officers are many and varied. 21 Cal.Jur. 400 et seq. Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.

[5-7] We are not unmindful of the constitutional privilege above mentioned which may be exercised by all persons, including police officers, in any proceeding, civil or criminal. In re Lemon, supra; In re Hoertkorn, supra. As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517. We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, or of any specific rule relating to "conduct unbecoming an officer". That such conduct constituted "conduct unbecoming an officer", there can be no doubt.

A somewhat similar state of facts was involved in Souder v. City of Philadelphia, 305 Pa. 1, 156 A. 245, 77 A.L.R. 610. The court there said, 305 Pa. 1, 156 A. on pages 246 and 247, 77 A.L.R. 610: "Souder was a captain of police, whose duty it was, not only to guard and protect the citizens of the municipality which had honored him with its confidence by appointing him to the high position of trust and civic responsibility which he filled and to run down and bring to justice malefactors within its limits, but also, as an officer in high command of its police, to preserve and enforce discipline among those over whom he had been placed in a position of authority. It was essential in the proper discharge of his duties that he should comport himself as an officer in such manner that no act of wrongdoing should attach itself to him, to the end that those who served under him should feel for him that respect which insures confidence and obedience. As such an officer in such a station he should have been keen to see that no taint of evil doing attached itself to him, and when charges were made, reflecting upon his honesty and integrity, that they were met with denial and answering proofs of no delinquencies. He should have held himself above suspicion. Instead of so doing, when charges of the gravest nature were brought against him by the grand inquest of the county, he answered before them in a way not to establish his freedom from wrong by full explanation, but in a manner calculated to confirm his complicity in crime, and, when summoned by his superior on specific charges before the tribunal charged by the law with the duty of inquiring into them, he answered not at all. This in itself was conduct unbecoming an officer."

[8] There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment. One of the most cherished rights guaranteed by the constitution is that of freedom of speech, yet no one would maintain that a police officer could

fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed, to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable.

Turning now to the specific contentions of appellants, other than the main question above discussed, it is contended first that the trial court erred in upholding the dismissals as the Police Commission was without jurisdiction. We find no merit in the contention, and will discuss appellants' several arguments on this point in the order in which we find them discussed in appellants' brief.

[9] The first argument is found under the heading "complaints not verified". Appellants cite section 155 of the Charter of the City and County of San Francisco which provides that "Members of either department shall not be subject to dismissal * * * except for cause, nor until after a fair and impartial trial before the commissioners of their respective departments, upon a verified complaint filed before such commission setting forth specifically the acts complained of. * * *" We may assume, without deciding, that a proper verification was a jurisdictional requirement, although the court in Donovan v. Board of Police Commissioners, 32 Cal.App. 392, 163 P. 69, cited by appellants, held that even if the verification was defective, such defect was one which could be and was waived by the officer against whom the proceedings were directed. We nevertheless find no merit in the claim that the complaints were not verified. The only complaint to which appellants' argument can possibly be directed is the complaint against appellant Mignola. All other complaints were duly verified before a deputy county clerk. The Mignola complaint was verified before the chief of police, but appellants argue that the chief of police had no authority for that purpose. Section 1028 of the Political Code provides that "Every executive and judicial officer may administer and certify oaths." Section 343 of the same code provides that "The number and designation of the civil executive officers are as follows: * * * such other officers as fill offices created by or under the authority of general laws for the government of counties, cities, and towns, or of the charters or special laws affecting the same." Section 4 of the charter of the City and County of San Francisco provides that the officers of said City and County shall be "* * * the executive appointed by each board or commission as the chief executive officer under such board or commission * * *". The chief of police, before whom the Mignola complaint was verified, was the chief executive officer appointed by the Police Commission. We therefore conclude that the Mignola complaint and all other complaints involved herein were duly verified before officers authorized for that purpose. See discussion in Haile v. Smith, 128 Cal. 415, 60 P. 1032.

[10] The second argument of appellants is that "the jurisdictional requirement of a fair and impartial trial was denied them". This refers to the trial before the Police Commission. It is based upon the fact that appellants sought to disqualify Commissioner Theodore J. Roche because of alleged bias and prejudice on his part and that said commissioner nevertheless participated in the trials. Appellants filed affidavits consisting largely of excerpts from newspaper articles which purported to quote certain statements made by Mr. Roche prior to the hearing before the Police Commission. We need not discuss the question of whether a person charged before an administrative board may successfully urge the disqualification of one or more of the members of such board on the ground of bias or prejudice. See Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; Butler v. Scholefield, 54 Cal.App. 217, 201 P. 625; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866; Rinaldo v. Board of Medical Examiners, 135 Cal.App. 613, 27 P.2d 671. Suffice it to state that we find nothing in the record sufficient to show bias or prejudice on the part of Mr. Roche. The substance of the allegations and excerpts from the newspaper articles contained in the affidavits may be sum-

marized as follows: That Mr. Roche had publicly announced that the failure of any officer to testify frankly before the grand jury would be considered "unofficerlike conduct"; that he had been active in amending the rules of the police department during the grand jury investigation to require specifically that all officers should testify without reservation as to all matters under investigation; that he had made statements showing that the Police Commission intended to enforce said rule strictly and to take disciplinary action against all who might assert their constitutional privilege by refusing to testify before this grand jury. Accepting the allegations and excerpts from newspaper articles as truly stating the attitude and statements of Mr. Roche, they showed only that Mr. Roche, and perhaps his fellow commissioners, had concluded that the refusal of any officer to testify before the grand jury would constitute conduct unbecoming an officer; that he had also determined that a specific rule requiring police officers to so testify should be enacted; and that he had issued a statement indicating that disciplinary action would be taken against any officer refusing to so testify. The soundness of the conclusion above mentioned cannot be challenged, and the enactment of the rule and the issuance of the warning tended to show the fairness of Mr. Roche and his fellow commissioners in advising all police officers in advance of that conclusion rather than to show any bias or prejudice on the part of any of said commissioners.

[11] The third argument is that the "commission lacked power to dismiss". In this portion of the argument, appellants claim that a certain amendment to section 19 of rule 46 of the police department was invalid. Said amendment was adopted to require specifically that members of the department should testify without reservation in any investigation conducted before the grand jury as well as in all cases before the courts. Said amendment was first adopted at a special meeting held on May 12, 1936, and was later readopted at a regular meeting held on May 18, 1936. We find no merit in the claim of invalidity made by appellants, but we do not believe it necessary to extend the discussion on this phase of appellants' argument. In the absence of any specific rule of the department, we are of the opinion that appellants were guilty of a clear violation of their duties as officers in refusing to testify before the grand jury, and that such violation constituted cause for dismissal as contemplated by section 155 of the charter. Furthermore, each appellant was charged with conduct unbecoming an officer within the meaning of rule 4 of the police department as well as with a violation of section 19 of rule 46. Both specifications contained in the complaints were based upon the refusal to testify before the grand jury, and there can be no doubt that such refusal constituted conduct unbecoming an officer and cause for dismissal.

[12] The fourth argument is that "appellants were not before grand jury". This argument appears to be based upon the claim that appellants had not been legally subpoenaed and that they attempted to make a special appearance before the grand jury "for the purpose of challenging the validity of the process". Appellants do not point to any defect in the subpoenas or the service thereof, but assuming that there was some invalidity, appellants were actually before the grand jury and their duty as police officers required them to give their testimony regardless of any such alleged invalidity.

[13] The final contention of appellants is that section 19 of rule 46 is unconstitutional. We believe that this contention is answered in a large measure by the foregoing discussion. The rule was but a definite expression of one of the general duties imposed upon all police officers. The adoption of the rule and the amendment above mentioned did not impose any new duties upon the members of the department, and the adoption thereof did not operate to deprive any member of the department of the right to exercise his constitutional privilege. That privilege still existed and was exercised by appellants. The rule is not, therefore, subject to attack upon constitutional grounds. What appellants have attempted to do is to claim an alleged right to continue as police officers despite a violation of their duties as such officers. It seems clear that they had no such right. McAuliffe v. Mayor, supra.

Appellants have discussed numerous authorities from other jurisdictions, all of which appear to be distinguishable on their facts. If any of said authorities may be said to indicate views at variance with the views hereinabove expressed, we believe that the reasoning found in Souder v. City of Philadelphia, supra, should be followed.

[14] We conclude that the Police Commission had jurisdiction and acted within the powers conferred upon it. We further conclude that appellants were not entitled to have the action of the Police Commission annulled or to have a writ of mandate issued to compel their reinstatement.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 574

## ROCHE v. POLICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11002.

District Court of Appeal, First District, Division 2, California.

June 29, 1939.

Hearing Denied Aug. 28, 1939.

**1. Municipal corporations ⚷185(3)**

A city and county police commission could properly consider previous record of police officer, together with his attitude and nature of his testimony before grand jury after his conviction by commission on charges arising from his previous refusal to testify, fixing penalty.

**2. Constitutional law ⚷213**

**Municipal corporations ⚷185(11)**

A city and county police commission's dismissal of police officer, who testified before grand jury after his conviction before commission on charges arising from his previous refusal to testify, was not invalid as denying him equal protection of law or constituting abuse of commission's discretion because another such officer, whose conduct was claimed to be identical, was returned to duty by commission, in absence of showing that dismissed officer's conduct was identical with that of any other officer.

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Proceeding by Thomas G. Roche to annul an order of the Police Commission of the City and County of San Francisco dismissing plaintiff from the police department of such city and county and compel the commission to reinstate him. From a judgment denying such relief, plaintiff appeals.

Affirmed.

J. Joseph Sullivan and John Francis O'Dea, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

SPENCE, Justice.

This is a companion case to Christal v. Police Commission, Cal.App., 92 P.2d 416, the opinion in which last named case has been this day filed. The facts and the points raised in the two cases are similar with the exception of certain additional facts and points involved herein which will be hereinafter set forth and discussed. No further discussion is required upon those points which were raised and disposed of in the Christal case.

After this appellant had been tried and found guilty of the charges heard by the police commission, appellant expressed his willingness to appear and testify before the grand jury. The police commission thereupon postponed to a later date the determination of the penalty to be imposed upon appellant. Appellant subsequently testified before the grand jury but was nevertheless dismissed from the police department. He thereupon instituted these proceedings in the superior court seeking to annul the action of the police commission and to compel said commission to reinstate him. The judgment of the trial court denied him the relief sought, and he has appealed from said judgment.

[1, 2] The first additional point raised by appellant is discussed under the heading "Unequal Protection of Laws". He stated that another officer, whose conduct was "identical", was returned to his duties while appellant was dismissed. He argues that "persons whose conduct has been identical and who have been charged with violation of the same regulations should enjoy the same rights and bear the same burdens". His second additional point, which is closely related, is discussed under the heading, "Imposition of Penalty Abuse of Discretion". His argument under this heading is similar to that advanced under the first mentioned heading, and he further argues that the punishment was severe for "a violation so slight".

It is sufficient answer to these additional points to state that there is nothing in the record to show that the conduct of appellant was "identical" with that of any other officer or that appellant's violation of duty was slight. In determining the penalty to be imposed in each case, the police commission no doubt considered among other things the previous record of each officer together with the attitude of such officer before the grand jury and the nature of the testimony, if any, finally given by him before the grand jury. The police commission could properly consider these and other facts in the exercise of its discretion when fixing the penalty, and such facts would necessarily differ in each case considered. There is nothing in the record to show that appellant was denied the equal protection of the law or that the commission abused its discretion in dismissing appellant. See Ludolph v. Board of Police Commissioners, Cal.App., 86 P.2d 118.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

33 Cal.App.2d 576

## DE GUIRE et al. v. POLICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11155.

District Court of Appeal, First District, Division 2, California.

June 29, 1939.

**1. Appeal and error** 🔑761

Headings, "Statement of Facts" and "Argument," in appellant's brief, are insufficient as not showing nature of question presented or point made. Rules of Supreme Court and District Courts of Appeal, rule 8, § 2.

**2. Municipal corporations** 🔑185(1, 5)

The police commission of city and county of San Francisco had power to dismiss police officer for violation of duty in refusing to testify before grand jury investigating criminal charges against him, though he acted on counsel's advice.

---

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Proceeding by Arthur H. De Guire and others to annul an order of the Police Commission of the City and County of San Francisco dismissing petitioners as police officers and compel their reinstatement. From a judgment denying petitioners any relief, they appeal.

Affirmed.

Hubbard & Hubbard, of San Francisco, for appellant DeGuire.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

SPENCE, Justice.

This is a companion case to Christal v. Police Commission, 92 P.2d 416, and Roche v. Police Commission, 92 P.2d 422, the opinions in which last named cases have been this day filed. It is submitted upon the same record as the Christal case. Appellant relies in part upon the points raised in the companion cases but as to said points, no further discussion is required.

In this case, appellant had refused to be sworn before the grand jury but, at a later date and after he had been ordered to do so by the superior court, he submitted to examination before that body. Thereafter he was tried before the police commission and was dismissed from the police department. He appeals from the judgment of the superior court which denied him any relief.

[1, 2] We find no headings in appellant's brief other than "Statement of Facts" and "Argument". Such headings do not show "the nature of the question to be presented or the point to be made". Rule VIII, sec. 2, Rules of the Supreme Court and District Courts of Appeal. The only point which appellant apparently seeks to raise, in addition to those points raised in the companion cases, is that he should not have been dismissed for his refusal to testify before the grand jury as he acted upon the advice of counsel. Appellant cites no authority to show the materiality of the fact that he acted upon the advice of counsel and we know of none. It is en-

tirely probable that some of the officers involved in the companion cases likewise acted upon the advice of counsel but their refusal to testify nevertheless constituted a violation of their duty as police officers and conduct unbecoming police officers. The police commission had the power to dismiss said officers for such violation of duty, and there is nothing to show that it abused its discretion in so doing.

The judgment is affirmed.

We concur: NOURSE, P. J., STURTEVANT, J.

---

33 Cal.App.2d 492

## DRUMAR MINING CO., Limited, v. MORRIS RAVINE MINING CO.

Civ. 6162.

District Court of Appeal, Third District, California.

June 24, 1939.

1. **Sales** 🔑273(5)

If buyer received an article selected by him, by its trade-name, and it had qualities that the trade-name imported, there would be no implied warranty that it was fit for his purpose, although seller knew it was to be used for that purpose and expressed an opinion that it would fill that purpose, but if trade-name was used merely to identify article, and seller, knowing buyer's purpose, selected article, and buyer relied on seller's skill and judgment, there would be an "implied warranty of fitness" for buyer's purpose. Civ.Code, § 1735, subds. (1, 4).

[Ed. Note.—For other definitions of "Implied Warranty," see Words & Phrases.]

2. **Sales** 🔑273(3)

The raising of an "implied warranty of fitness" depends upon whether buyer informs seller of circumstances and conditions which necessitated his purchase of a certain general character of articles, and left it to seller to select particular kind and quality of articles suitable for buyer's use and this is true, whether rules of common law or Uniform Sales Act apply.

3. **Sales** 🔑273(5)

The rule that on the sale of a specified article under its patent or trade-name there is no "implied warranty of fitness" for any particular purpose applies only to goods known in market and among those familiar with that kind of trade by that description. Civ.Code, § 1735, subd. (4).

4. **Sales** 🔑273(5)

Where an agent for buyer was prevailed upon to purchase a second-hand Huelsdonk Concentrating Gold Washing Machine by agent for seller who knew buyer's purpose in purchasing machine and that buyer was relying on his skill and judgment, and neither party gave any importance to use of trade-name "Huelsdonk," there was an "implied warranty of fitness" of the machine for buyer's purposes. Civ.Code, § 1735, subds. (1, 4).

5. **Sales** 🔑266

The general rule is that there is no implied warranty as to quality in sale of secondhand or used machinery.

6. **Sales** 🔑269

The rule, "caveat emptor," according to the later trend of authority, does not usually operate to preclude implication of a warranty of some character from sale of personalty, especially where there was no opportunity for an efficient inspection, or where buyer relied on skill and judgment of seller.

[Ed. Note.—For other definitions of "Caveat Emptor," see Words & Phrases.]

7. **Sales** 🔑273(3)

Where buyer of a secondhand concentrating gold washing machine had no opportunity for efficient inspection without a test, seller to buyer's knowledge had made test and seller knew purpose and requirements of buyer and buyer relied and had right to rely on seller's skill and judgment, the fact that machine was secondhand did not preclude an implied warranty of fitness. Civ.Code, § 1735, subd. (1).

8. **Sales** 🔑273(3)

Where a buyer of mining machinery had no opportunity to efficiently inspect it, and relied on the skill and judgment of agent for selling corporation, skill and judgment of agent would be imputed to selling corporation so as to raise an implied warranty of fitness by selling corporation. Civ.Code, § 1735, subd. (1).

**9. Sales** ⊂⊃**126(2)**

A purchaser of machinery by unreasonable delay, after being aware of facts giving him a right to rescind contract of purchase, loses his right to rescind, but the right is not forfeited by making an honest attempt to make machine function properly, and under circumstances in which article is durable or defect obscure, the right to rescind may be exercised after a reasonable lapse of time.

**10. Sales** ⊂⊃**126(2)**

A purchaser of a concentrating gold washing machine under a conditional sales agreement was not barred by "laches" from rescinding agreement on ground of violation of an implied warranty of fitness for use, where machine was purchased in August, 1936, tests of machine began in January, 1937, and extended until end of February, and notice of rescission was given on March 18, 1937.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the Drumar Mining Company, Limited, against Morris Ravine Mining Company to recover overdue payments on conditional sales agreement for sale of a concentrating gold washing machine. Defendant filed a cross-complaint for damages. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Fred A. Watkins, of San Francisco, for appellant.

H. M. Anthony, of San Francisco, and H. D. Gregory, of Oroville, for respondent.

ALLEN, Justice pro tem., delivered the opinion of the court.

On the 10th day of August, 1936, plaintiff sold to defendant certain mining machinery, being what is called a Huelsdonk Concentrating Gold Washing Machine, and appliances therefor, on a written conditional sales agreement, the purchase price being $1,750, payable in monthly instalments. In the negotiations leading to the contract plaintiff was represented by one V. Dale Martin, its secretary-treasurer and general manager, who was also consulting engineer for defendant corporation in its mining operations. Defendant was represented by J. M. Sharpe, its president. The machinery involved had been used by plaintiff in its mining operations for more than one year before being sold to defendant and was used or secondhand machinery at the time of the sale to defendant. Plaintiff corporation was not a manufacturer or dealer in mining machinery, and the machinery was sold to defendant either because plaintiff could not, or did not, wish to use the same any longer. The defendant purchased the machinery for use in its mining operation, and for the particular use and purpose of washing gold from gravel in order to save the gold. Mr. Sharpe had knowledge that the machinery had been used by plaintiff in its mining operations and had seen the same operating on plaintiff's property. The court found that defendant made known to plaintiff, and that plaintiff had knowledge of, the particular purpose for which the goods were required by defendant, and that defendant, in purchasing such machinery, relied on the plaintiff's skill and judgment. The court also found that the machinery was not reasonably fit for the particular purpose for which it was required. There is ample evidence to sustain these findings.

Defendant failed to make the payments as required by the contract, and plaintiff brought suit to recover overdue payments, and defendant attempted to rescind the contract, and denied liability thereunder, and filed a cross-complaint for damages. The court in giving judgment for the defendant, found there was no express warranty of fitness, and as the agreement contains no such warranty, with this finding we agree. The court based its judgment on the finding that there was an implied warranty of fitness and this is the principal question for determination on this appeal.

The point urged with greatest force by counsel for appellant in their brief and argument is: That the goods supplied were sold under a trade name, to-wit: "A Huelsdonk Concentrator", and therefore there is no implied warranty of fitness for any particular purpose. Supporting this contention plaintiff relies on subdivision 4 of section 1735 of the Civil Code, which reads: "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

Subdivision (1) of the same section reads: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

This section of the code is an enactment of that identical part of the Uniform Sales Act which has been adopted by most states. In applying this section, three important questions arise:

Firstly: What is meant by a "patent" or "trade name"?

Secondly: Was the selection of the article made by the buyer because of the well-known qualities existing in an article of that trade name? and:

[1] Thirdly: Was the article purchased with the seller's knowledge of the purpose for which the purchaser intended it to be used, and did the buyer rely on the seller's known skill and judgment to furnish an article fit for that purpose, and was the name used merely to identify the article? In the first place, if the buyer received the article selected by him, by its trade name, and it had the qualities that the trade name imported, there would be no implied warranty that it was fit for his purpose, although the seller knew it was to be used for that purpose and expressed an opinion it would fulfill that purpose. In the second place, if the name was used merely to identify the article, and the seller, knowing the buyer's purpose, selected the article, and the buyer relied on seller's skill and judgment, there would be an implied warranty of fitness for buyer's purpose. These seem to be the general rules in all jurisdictions, and is not out of harmony with the cases cited by appellant. In 59 A.L.R., page 1180, the rule is stated:

[2] "The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated his purchase of a certain general character of article, and left it to the seller to select the particular kind and quality of article suitable for the buyer's use. And this is true without reference to whether the rules of common law or the Uniform Sales Act apply. * * * The major question in determining the existence of an implied warranty of fitness for a particular purpose, is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs, and the question as to whether the article was described by its trade name or trade mark, is not conclusive, if the other conditions exist which would raise an implied warranty of this character."

[3] In Barrett Company v. Panther Rubber Mfg. Co., 1 Cir., 24 F.2d 329, 336, the question of what was meant by a trade name as used in subdivision 4 of this section was involved, and the court said: "We think the rule applies only to 'goods known in the market and among those familiar with that kind of trade by that description.'"

In O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 6 Cir., 258 F. 1, it was held that it was for the jury to decide from the evidence whether the article was sold under a patent or trade name, or whether the buyer relied upon the seller's skill and judgment.

In Beggs v. James Hanley Brewing Co., 27 R.I. 385, 62 A. 373, 374, 114 Am.St.Rep. 44, the holding was against an implied warranty, the article being sold under trade name, the holding being on the ground that "the apparatus contracted for * * * was * * * well known, and in use in other places [in the trade]". In 59 A.L.R. page 1187, the rule is stated: "Where the selection is actually made by the buyer, subdivision 4 applies, even though the seller knew that the buyer was purchasing the article for some particular use, and induced the contract by trade talk with reference to the general good qualities of the article. If, however, the seller goes further than this, and recommends the article as particularly fit for the buyer's use, this would seem to amount to selection by the seller."

The following cases bear out the rule as above stated, that where the selection is made by the seller for the particular and known use of the buyer, and the buyer relies on the skill and judgment of the seller, there is an implied warranty of fitness: Sachter v. Gulf Ref. Co., Sup., 203 N.Y.S. 769; Ireland v. Louis K. Leggett Co., 243 Mass. 243, 137 N.E. 371; Sperry Flour Co. v. De Moss, 141 Or. 440, 18 P.2d 242, 90 A.L.R. 406; and numerous cases in notes in 59 A.L.R. p. 1180, and 90 A.L.R. 410. Appellant cites:

[4] Atteaux & Co. v. Pancreon Mfg. Co., 1 Cir., 22 F.2d 749; Davis Calyx Drill

Co. v. Mallory, 8 Cir., 137 F. 332, 69 L.R.A. 973; Matteson v. Lagace, 36 R.I. 223, 89 A. 713; and many other cases in support of his contention, but all are in harmony with the above rule. The circumstances and facts of each case control the decisions. The rule is, if the selection of an article, by a patent or trade name, is made by the buyer, there is no implied warranty, but if the seller knows the uses and purposes of the buyer, and selects the particular article to do the buyer's work, and the buyer relies upon the skill and judgment of the seller, there is an implied warranty. The evidence in this case discloses that plaintiff's agent had full knowledge of defendant's requirement, went to defendant's agent, and prevailed upon him to buy the machine, stating: "It is the thing you want for your job." And the defendant relied upon plaintiff's agent's skill and judgment, and no importance was given by either party to the name "Huelsdonk". It was merely used to identify the article. There is no evidence that the name was either patented or well known in the trade. Therefore, under the circumstances, we hold that the sale was not made under a patent or trade name, but the selection was made by the seller, knowing buyer's purpose, and relying on buyer's skill and judgment, the use of the name "Huelsdonk" did not prevent the arising of an implied warranty of fitness.

[5] The next point made by appellant is that the article sold was secondhand or used machinery, and that there is no implied warranty of fitness in the sale of secondhand or used machinery. Appellant does not urge this point with any great force, but it is our view it is the most serious question presented. There is no question but that the machinery was known by the purchaser to be used or secondhand machinery and that defendant's agent had ample opportunity to see the same. The doctrine has been announced in many cases, and the general rule seems to be that: "There is no implied warranty as to quality in the sale of secondhand or used machinery." 24 R.C.L. 170; Durbin v. Denham, 106 Or. 34, 210 P. 165, 29 A.L.R. 1227; Tibbets & Pleasant, Inc. v. Town of Fairfax, 145 Okl. 211, 292 P. 9; Lamb v. Otto, 51 Cal.App. 433, 197 P. 147. The question here to be determined is: Does the general rule that there is no implied warranty prevail in all cases when the sale of known secondhand machinery is made? The vast volume of business done in secondhand machinery makes it important that any decision on this point be well considered, and that the general principles as applied to the facts in the particular case must be kept constantly in mind. If, as the evidence and facts as found by the court, showed in this case, a seller having an article of machinery used by him, the capacity and quality of which is thoroughly familiar, and being also thoroughly familiar with the needs, use and requirements of the buyer, prevails upon a buyer to purchase this machinery, the buyer knowing that the seller knows the machinery and knows the buyer's needs, the machinery being of such character that only operative tests and not mere inspection could determine its fitness, and the buyer knowing that the seller has made these tests, and relying solely on such seller's skill or judgment, makes the purchase, will the fact that the machinery was secondhand preclude an implied warranty of fitness?

There is nothing in the Uniform Sales Act declaring there is no implied warranty in the sale of secondhand goods. Section 1735 of the Civil Code declares there is no implied warranty or condition as to the quality of fitness for any particular purpose, of goods supplied under a contract to sell, or a sale, except (then this general statement is followed by several exceptions). It would seem that the legislature intended this section to apply to all sales of goods, whether new or secondhand. In subdivision 1 of this section, this language is used: "Where the buyer * * * makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment * * * there is an implied warranty that the goods shall be reasonably fit for such purpose."

In the case of Lamb v. Otto, supra, and in all other cases cited, the circumstances were very much different than the case at bar. In Durbin v. Denham, 106 Or. 34, 39, 210 P. 165, 166, 29 A.L.R. 1227, a case dealing with the sale of secondhand machinery, it was stated: "According to the principles of deciding cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality."

Applying this rule to the case at bar, it is apparent that only an operative test could determine the fitness of the machine. An inspection without an operative test would determine nothing as to its fitness. The seller, to the buyer's knowledge, had made this test, and the seller well knew the purpose and requirements of the buyer, and the buyer relied, and had a right to rely, on the seller's skill and judgment. In such a case, it would appear that substantial justice requires the raising of an implied warranty. In 29 A.L.R. at page 1231, it is stated:

[6] "The rule, caveat emptor, according to the later trend of the authority, does not usually operate to preclude the implication of a warranty of some character from the sale of the personalty, especially where there was no opportunity for an efficient inspection, or where the buyer relied upon the skill and judgment of the seller."

[7, 8] Therefore, under the circumstances of the case at bar, the fact that the machinery was secondhand does not preclude the implication of a warranty of fitness. Both parties to this action are corporations dealing through their agents. This fact does not alter the situation. That artificial person we call a corporation may seem to be a senseless robot without either skill or judgment, but when it enters into dealings with human beings, the skill and judgment of the human beings that control it must be imputed to it. In the words of Judge Hardy: "It deals man to man." Therefore, as there was no opportunity for efficient inspection without a test, and as the buyer had to rely on seller's skill and judgment, we hold the fact the machinery had been used by the seller does not preclude the implied warranty of fitness.

[9, 10] The next point made by appellant is that the defendant was guilty of laches and lost its right to rescind the contract. It is no doubt the law that by unreasonable delay, after being aware of the facts giving a party a right to rescind, he loses his right, but the right is not forfeited by making an honest attempt to make a machine function properly, and under circumstances in which the article is durable or the defect obscure, the right to rescind may be exercised after a reasonable lapse of time. In this case, while the machine was purchased on August 10, 1936, the defendant had to install the same, and had to fill his bins with ore in order to put the machine to the test. The test began in January, 1937, and extended through January and February. The machine was not used after March 1, 1937, and notice of rescission was given on March 18th. We do not believe that an unreasonable length of time was consumed in this test, or in giving the notice after the test proved unsatisfactory. Gibson v. Cruickshank, 78 Cal.App. 652, 248 P. 732; Nole v. Baida, 202 Cal. 98, 259 P. 433; Lichtenthaler v. Samson Iron Works, 32 Cal.App. 220, 162 P. 441; Brandenberg v. Samuel Stores, 211 Iowa 1321, 235 N.W. 741, 77 A.L.R. 1161, and notes.

The judgment appealed from is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

33 Cal.App.2d 612

**CAMP et al. v. PEEL et al.**

**Civ. 11788.**

District Court of Appeal, Second District, Division 1, California.

July 7, 1939.

Hearing Denied Sept. 5, 1939.

**1. Negligence 🔑62(1)**

A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, notwithstanding such injury would not have happened but for such condition or occasion; the intervening or subsequent act being the "proximate cause."

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

**2. Evidence 🔑7**

It is common knowledge that there is nothing inherently dangerous in lime putty.

**3. Negligence** ⚷23(1)

Evidence that workmen on partially completed building in the course of construction left lime putty on scaffold over holiday and that during fight among children, who were playing around and upon the building, plaintiff, an eight-year-old girl, was struck in face and eyes by some of the lime putty, established no actionable negligence against subcontractor doing the lathing and plastering work on building; the "attractive nuisance doctrine" not being applicable.

[Ed. Note.—For other definitions of "Attractive Nuisance," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Bobette Camp, a minor, by her guardian ad litem, Alexandria Camp, and Alexandria Camp, against J. A. Peel, the Los Angeles City School District of Los Angeles County, a school district, and others, for injuries sustained by the minor plaintiff as the result of being struck in the face and eyes with lime putty. From an adverse judgment, defendant J. A. Peel appeals.

Judgment reversed.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for appellant.

Guthrie & Darling, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by defendant from a judgment in an action for damages for personal injuries sustained by the minor plaintiff, an eight year old girl, as the result of being struck in the face and eyes with some lime putty.

The accident occurred on November 11, 1936, which was a public holiday, in an auditorium building under construction on property adjoining the Santa Barbara Avenue School in Los Angeles; the auditorium, when completed, was to be used as a part of the school.

In connection with the work of lathing and plastering the interior of this building, defendant and appellant J. A. Peel, the plastering subcontractor, had erected a scaffolding therein for the purpose of enabling his workmen to reach the ceiling of the auditorium. Six of the eight children who were playing in the building on that day testified that they saw a ladder leading from the ground up to the scaffolding. These minors were engaged in various forms of activities; some of them were playing in sandpiles around the building, others were playing hide-and-seek, some were throwing rocks, and a few of them eventually climbed up to the scaffolding within the building and, from a position thereon, commenced to throw around some lime putty which had been left by the plasterers on top of one of the mortar boards. The minor plaintiff, who was standing on the ground floor of the building near a doorway leading to the street, playing with a toy, was struck in the face with some of the substance.

The action was brought against a number of defendants, including defendant and appellant Peel. The relationship of the various defendants with respect to this construction work was as follows: The Los Angeles City School District let a contract to the defendant DeCamp Hudson Company, Ltd., for the construction of said building, and the latter company, in turn, let a subcontract to defendant and appellant Peel for the lathing and plastering work to be done on the interior of the auditorium building.

At the conclusion of plaintiffs' case the court granted a motion for a nonsuit in favor of defendant DeCamp Hudson Company, Ltd. At the conclusion of all of the evidence in the case the court granted a motion for a directed verdict in favor of the remaining defendants except defendant J. A. Peel.

Respondents concede, as contended by appellant, that the judgment can be upheld only by the application of the attractive nuisance doctrine. That doctrine, although frequently exposed to the likelihood of extension through the influence of sympathy, is definitely limited. In that connection the Supreme Court has had occasion to comment as follows: "Unless the case falls within the doctrine of the turntable cases—a doctrine which this court and others have refused to extend—the plaintiff may not recover * * *. In the case of Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, 56 Am.St.Rep. 106, this court refused to extend the rule of the turntable cases to a pond of water, and characterized that rule as an exceptionally harsh rule of liability." Whalen v. Streshley, 205 Cal. 78, 81, 269 P. 928, 929, 60 A.L.R. 445.

The so-called "turntable" case is Barrett v. Southern Pacific Co., 91 Cal. 296, 27 P. 666, 25 Am.St.Rep. 186. Peters v. Bowman, supra, discusses the doctrine extensively and in denying a rehearing, Beatty, Chief Justice, observed [115 Cal. 345, 47 P. 599]: "But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. * * * The facts being undisputed, it is the province and the duty of the court to decide, as a matter of law, whether a defendant has been guilty of culpable negligence." See, also, Giannini v. Campodonico, 176 Cal. 548, 169 P. 80.

The record herein reveals that at the time the injuries were received, the children were engaged in a rock fight. For example, the witness Robert Melburg testified as follows: "In the building besides myself and my brother and William Shanks about the only ones were that little girl and a little boy they called Salvadore. The other children were doing the same thing we were, throwing rocks. Nothing else. Not all were throwing rocks. Those not throwing rocks were standing around and watching and bringing the rocks."

[1] It is evident that the children were attracted by a partially completed building in the course of construction. It may be conceded that such a structure is an attraction to children, but it does not follow that liability for injury occurring to children, while playing in, around, and upon it, is to be determined by the application of the attractive nuisance doctrine. As the Supreme Court has declared: "But it by no means follows, as has been said, that anything or everything which a jury may find or a court may determine to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. Moving street cars and moving vehicles upon the street are irresistibly attractive to many children, and thousands daily imperil their lives by climbing on and off of them while in motion. Venturesome boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight." Loftus v. Dehail, 133 Cal. 214, 218, 65 P. 379, 380. See, also, Doyle v. Pacific Electric R. Co., 6 Cal.2d 550, 59 P.2d 93; Hernandez v. Santiago O. G. Ass'n, 110 Cal.App. 229, 233, 293 P. 875.

It should be noted that plaintiff's injury was the direct result of acts over which appellant had no control, namely, the throwing of rocks, lime putty, etc., by the children with whom plaintiff was engaged in play, and, as pointed out by appellant, a similar or even more serious injury might have resulted had the object thrown, which caused the damage, been a rock, nail or some other object.

[2] The law appears to be well settled that " 'A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause.' " Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, at page 226, 23 P.2d 1068, at page 1070, quoting from 45 Cor.Jur., page 931, which erroneously appears in the above quoted opinion as 45 Cal.Jur. page 931.

[3] It is a matter of common knowledge that there is nothing inherently dangerous in lime putty, and hence the leaving of lime putty on the scaffolding did not in itself create a dangerous condition, and, as a matter of law, was not an act of negligence. The attractive nuisance doctrine therefore is not applicable and may not be taken into account in determining the questions here involved.

The record reveals no actionable negligence on the part of appellant.

For the foregoing reasons the judgment is reversed.

We concur: YORK, P. J.; WHITE, J.

33 Cal.App.2d 616

## PEOPLE v. ELLIS et al.

**Cr. 3200.**

District Court of Appeal, Second District, Division 1, California.

July 7, 1939.

**1. Criminal law 🔑736(2)**

Whether defendant's confession of crime charged was free and voluntary is preliminary question addressed to trial court, which must be allowed considerable measure of discretion in determining it.

**2. Criminal law 🔑1153(6)**

A reviewing court cannot say that trial court erred in admitting defendant's confession, unless such error appears as matter of law from record presented.

**3. Criminal law 🔑1120(8)**

Defendant's contention on appeal from judgment of conviction that his confession was involuntary because of violation of statute requiring that person arrested without warrant be taken before nearest magistrate without unnecessary delay cannot be considered, where record reveals no reference to date of defendant's arraignment before magistrate or that of his preliminary examination and apprises appellate court that confession was obtained less than 36 hours after defendant's arrest. Pen. Code, § 849.

**4. Criminal law 🔑1144(12)**

Where evidence on question whether defendant's confession was free and voluntary is conflicting, it must be assumed on appeal from judgment of conviction that testimony concerning defendant's admissions was properly admitted.

**5. Criminal law 🔑531(3)**

Evidence *held* sufficient to warrant conclusion that defendant's confession was not induced by threats, force, promises, inducements or illegal process, but made freely and voluntarily, so that trial court did not abuse its discretion in admitting confession in evidence.

**6. Criminal law 🔑534(1)**

Defendant's confession, containing full and complete admission of his guilt of all offenses charged in information, and circumstantial evidence tending to connect him with commission thereof, *held* sufficient to support convictions of burglary and assault with deadly weapon.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Albert L. Edman was convicted of burglary and assault with a deadly weapon as charged in information jointly with George S. Ellis, and defendant Edman appeals.

Affirmed.

Philip Shacknove, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles county appellant was charged jointly with one George S. Ellis with four counts of burglary, while the fifth count accused both defendants of the crime of assault with a deadly weapon. As to appellant, the information further charged two prior felony convictions and penal servitude therefor, all of which were admitted. So far as defendant Ellis was concerned, the case was disposed of by a plea of guilty, while as to appellant the cause proceeded to trial before the court following appropriate waiver of a jury, the trial resulting in a decision by the court finding appellant guilty of the charge contained in each count of the information. Defendant appeals from the judgment.

Epitomized, the facts presented in the evidence were that a series of burglaries were perpetrated in Los Angeles county through illegal entry into a warehouse and three markets, from which certain merchandise was stolen. While the burglary charged in count I was in progress the perpetrators thereof came upon the night watchman, upon whom they made a vicious assault, rendering him unconscious and effecting their escape. This assault forms the basis of count V of the information. Appellant and his codefendant, Ellis, were apprehended about 3 o'clock on the morning of September 8, 1938, by the police at Compton in the county of Los Angeles. At that time both defendants were in an automobile and one of the officers found in the automobile an iron pinchbar, a flashlight, a five-shot U. S. revolver containing four shells, a Remington automatic, packages of cigarettes, tobacco, gum, and a bottle partially filled with whiskey, all identified as being the exact property or similar in every way to the merchandise stolen in the burglaries. Upon searching appellant, the officers found upon his person two keys which fitted the apartment occupied by a lady friend of appellant. Upon a search of this apartment the officers found therein a quantity of cigarettes, hams, cheese and whiskey, also of the same kind and character as the merchandise stolen in the burglaries. Appellant denied participation in any of the burglaries or in the assault committed upon the watchman, explaining his presence in the automobile at the time of his arrest with the statement that his codefendant, Ellis, had taken him in the automobile from a liquor establishment and was driving him around in an effort to "sober him up". With reference to the apartment keys found upon his person, appellant stated that he had received them from his lady friend the evening before, and he disclaimed any knowledge of the ill-gotten goods sequestered in either the automobile or the apartment to which the keys belonged.

The two grounds for reversal upon which appellant depends are thus stated by his counsel: (1) The verdict is contrary to and unsupported by the evidence and is contrary to law; (2) the court erred in admitting into evidence the confession of appellant.

In connection with the points thus presented, appellant suggests that, leaving out of consideration the purported confession, the evidence was wholly circumstantial, and he insists that all the circumstances were of such nature that they do not in any way tend to show any connection on the part of appellant with either the assault upon the night watchman or with the four burglaries. We cannot agree with appellant's contention in this regard. From the facts epitomized by us herein and which in much greater detail are contained in the record, we are led to the conclusion that there is considerable incriminatory evidence tending to connect appellant with the commission of the crimes, if the court chose not to believe the explanation offered by appellant in relation thereto.

We come now to a consideration of appellant's contention that the confession obtained from him was erroneously admitted in evidence by the court. As herein narrated, appellant was arrested early on the morning of September 8, 1938. The arrest was made by the officers without a warrant. The confession was obtained from appellant on the evening of September 9. The latter testified that from the time on September 8 when he was delivered into the custody of Los Angeles city police officers and the evening of the day following when he signed the written confession, he was constantly interviewed and questioned, during which inquisition he was brutally beaten and kicked. When asked at the trial as to whether he signed the confession only because "you were afraid you would be further beaten up", appellant testified, "Yes, I would not have been not only in fear of it, I know I would have been. I knew I had to sign it." It is at once apparent that if the testimony of appellant describing the treatment to which he was subjected during the interval elapsing between his arrest and the signing of the confession stood uncontradicted as the only evidence on the subject, it would have been gross error to admit in evidence a confession so obtained. But his testimony is contradicted by that of the officers, who testified that they did not use threats, promises or mistreatment of any kind in obtaining the confession. The claim of the officers with reference to the manner in which the confession was obtained may be crystallized in the following testimony given by one of the Los Angeles city policemen:

"A. I was questioning this defendant about where he had disposed of these stolen cigarettes and he didn't want to tell me.

"Q. What did he say? A. He said he didn't want to involve other people in it, and he said he either wanted to stand pat or go all the way, and he said that he couldn't make up his mind. He wanted to talk to this girl in Lincoln Heights. He said he was in love with her and whatever she told him to do he would do.

"Q. This was the same girl, Juanita Harris, that was in this apartment where the keys fitted the door? A. Yes, sir.

* * *

"Q. (By Mr. Stahlman, Deputy District Attorney): Was there any further conversation on that occasion, officer, with this defendant? A. I heard this girl tell this defendant to tell the truth about it.

"Mr. Appel (defendant's counsel): I move that that be stricken out.

"The Court: Motion granted.

"Q. By Mr. Stahlman: You were present? A. Yes, I was present.

"Q. The girl was there? A. Yes, sir.

"Q. The defendant was there? A. Yes, sir.

"Q. Did he make any reply to that statement? A. Well, he made some reply, but I don't know just what it was. I didn't hear it.

"Q. What was the next thing you said to him or he said to you? A. I called him then and we left the room at Lincoln Heights and I asked this defendant how he felt about it. He said 'I am going to tell the truth about it.'

"Q. Was there a further conversation after that? A. Yes. We left and went back to central station.

"Q. Who was present at central station? A. Deputy Sheriff Claxton, myself and this defendant. * * *

"Q. By Mr. Stahlman: Were you present thereafter at the time the statement taken from Ellis was shown to this defendant? A. Yes, sir, I was.

"Q. Where was that? A. That was in the city jail.

"Q. Who was present? A. Deputy Sheriff Claxton and myself, and special officer Howrey. I forget who the other officer was.

"Q. At that time did you have in your possession a copy of this statement which was previously given by Ellis? A. I did.

"Q. Was that statement read by this defendant or read to him at that time? A. It was read by this defendant.

"Q. In other words, you turned it over to him and saw him reading it? A. Yes, sir.

"Q. Did you have any conversation with him pertaining to the statement? A. I did.

"Q. What was said? A. I asked him to read it and make any corrections that should be made, and if it was the truth to sign it.

"Q. By the Court: What did he say? A. He didn't say anything then, but he read it and made a correction on it, and then signed it after he had read it."

[1] Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. People v. Connelly, 195 Cal. 584, 598, 234 P. 374; People v. Castello, 194 Cal. 595, 599, 229 P. 855; People v. Siemsen, 153 Cal. 387, 394, 95 P. 863; People v. Wilson, 79 Cal.App. 709, 712, 713, 250 P. 879. In People v. Siemsen, supra [153 Cal. 387, 95 P. 866], it is said that the "admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the (trial) judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." It has also been held that the mere fact that the confession was made to a police officer or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. People v. Hoge, 25 Cal.App. 456, 458, 143 P. 1072; People v. Quan Gim Gow, 23 Cal. App. 507, 512, 138 P. 918.

[2-4] Appellant further urges the involuntary character of the confession by reason of the alleged violation of section 849 of the Penal Code, which provides that when a person is arrested as was this appellant, without a warrant, he must be taken, without unnecessary delay, before the nearest and most accessible magistrate in the county in which the arrest is made and a complaint stating the charges against such person filed with such magistrate. It is the law that a reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented. Appellant contends that the record shows he was arrested on September 8, but "was not arraigned before a magistrate for preliminary examination until September 28", some twenty days after his arrest without a warrant. While a violation of the law requiring that a person arrested without a warrant must be taken promptly before a magistrate would be a factor in determining whether such illegal process constituted external means of pressure by which the free will of the defendant has been overcome, the record before us is not as contended for by appellant in that regard. A careful search thereof by us reveals no reference therein either to the date of appellant's arraignment before a magistrate or the date of his preliminary examination, while it does apprise us of the fact that a confession was obtained in less than thirty-six hours after appellant's arrest. In view of the fact that the trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, where

the evidence, as here, is conflicting on the subject, it must be assumed that the testimony concerning defendant's admissions was properly admitted. People v. Castello, supra; People v. Shaffer, 81 Cal.App. 752, 756, 757, 254 P. 666; People v. Tugwell, 28 Cal.App. 348, 356, 152 P. 740.

[5, 6] We are not prepared to say that the court below abused its discretion when it admitted the appellant's confession in evidence. There is ample evidence in the record, some of which is outlined above, warranting the conclusion that it was not induced by threats, force, promises, inducements, or illegal process, but was freely and voluntarily made. Containing as it does a full and complete admission of appellant's guilt as to all the offenses contained in the information, the decision finding him guilty and the judgment pronounced thereon find abundant support in the evidence.

For the foregoing reasons the judgment from which this appeal is taken is affirmed.

We concur: YORK, P. J.; DORAN, J.

33 Cal.App.2d 581

## COOK v. MAIER et al.

Civ. 10722.

District Court of Appeal, First District,
Division 1, California.

June 30, 1939.

Hearing Denied Aug. 29, 1939.

**1. Appeal and error 🔑236(2)**

The sustaining of demurrer to defective complaint without leave to amend is not reversible error, notwithstanding that defective complaint can be cured by amendment, where no request to amend is presented.

**2. Appeal and error 🔑236(2)**

The rule that it is not reversible error, in absence of request to amend defective complaint, to sustain demurrer without leave to amend, even though complaint can be cured by amendment, is subject to exception that request to amend would be an idle act where pleader elects to stand or fall on allegations of complaint without seeking to amend.

**3. Automobiles 🔑238(3, 8)**

A complaint alleging that automobile, as proximate result of motorist's negligence, ran off street and collided with fence, causing rocks and parts of fence to be thrown about plaintiff, and that as a proximate result thereof the plaintiff suffered injuries, sufficiently alleged the negligent act and the causal connection with the injuries, notwithstanding absence of allegation that motorist's negligence was willful and intentional, or that motorist should have anticipated that his negligence would cause the injuries.

**4. Negligence 🔑59**

The natural and probable consequences of a negligent act or omission are those which should reasonably have been anticipated.

**5. Negligence 🔑108(2)**

Negligence may be pleaded generally.

**6. Pleading 🔑216(1)**

Whether or not the negligence pleaded and the results therefrom are true are questions of fact which cannot be determined on demurrer.

**7. Damages 🔑208(1)**

Whether physical injury following shock is a direct and natural effect of mental shock is question for trier of facts.

**8. Damages 🔑52**

Fright alone is not an "injury" that may be the basis of a claim for damages, but fright accompanied by fear of immediate personal injury and by physical injury is compensable.

[Ed. Note.—For other definitions of "Injury," see Words & Phrases.]

**9. Damages 🔑52**

To recover for fright followed by physical injury, causal connection proceeding in an unbroken course from fright to physical injury must be shown.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Wilelmine Cook against Augusta Maier, Benjamin Unger and others for personal injuries allegedly sustained when automobile ran into rock and board fence on plaintiff's land and crashed into corner of plaintiff's house. From a judgment entered after an order sustaining a demurrer to a first amended complaint, the plaintiff appeals.

Reversed and remanded for further proceedings.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting.

Phillips & Munck and James H. Phillips, all of Oakland, for appellant.

Charles V. Barfield, of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment entered after an order sustaining a demurrer to a first amended complaint, without leave to amend.

The complaint alleges that defendant Benjamin Unger, an employee of defendant Augusta Maier, acting within the course and scope of his employment, so carelessly and negligently drove and operated her automobile that it collided with a second automobile; that as a proximate result of said collision, and the negligence of Unger in operating the vehicle, it ran up and "on to" a vacant lot, the property of plaintiff adjoining her home, where, with a loud noise and crash, it collided with a trash burner, thereafter running into a rock and board fence and the corner of her house, all within fifteen feet of her, and causing rocks and parts of the fence "to be thrown and scattered over plaintiff's said property in the direction of plaintiff and about the person of plaintiff" who was on her way to the trash burner. The complaint further alleges that as a proximate result of the movements of the automobile, plaintiff became fearful of her own safety and suffered certain personal injuries, including fright, shock, sickness of body and mind and "loss of feeling for a considerable period of time in her left arm and causing her to be confined to her bed."

[1, 2] The contention of respondents, namely, that appellant, by reason of her failure to apply to the trial court for permission to amend, may not complain, should be disposed of prior to the consideration of the merits of the demurrer. The general rule is that when a defective complaint may be cured by amendment, if no request to amend is presented, it is not reversible error to sustain the demurrer without leave to amend. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550; Consolidated Reservoir & Power Company v. Scarborough, 216 Cal. 698, 16 P.2d 268. This rule is, of course, subject to the exception that when the pleader elects to stand or fall upon the allegations of the complaint, without seeking to amend, a request to do so would be an idle act. California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297; Robinson v. Godfrey, 78 Cal.App. 284, 248 P. 268. In the last cited case, 78 Cal.App. at page 288, 248 P. at page 270, the court said: "* * * in order that the appeal from the judgment succeed, it must be shown by appellant that the complaint was sufficient in its entirety and properly subject to none of the objections thereto as specified in the demurrer".

[3] This brings us to a consideration of the grounds of the demurrer. The allegations of the complaint are sufficient to inform defendants that, as a proximate result of the negligence of the driver, the automobile "was caused to and did run up" and collide with the trash burner, the rock and board fence and the corner of the house, causing rocks and parts of the fence "to be thrown and scattered * * * about the person of plaintiff"; that the appearance of the automobile was sudden and unexpected and that as a proximate result thereof and the scattering of rocks, etc., plaintiff became fearful of her safety and suffered certain injuries. The negligent act and the causal connection, with the injuries, is sufficiently alleged. Something more than mere fright is alleged, namely, that the nervous system was injured, which resulted "in loss of use of and loss of feeling for a considerable period of time in her left arm and causing her to be confined to her bed". It was not necessary, as respondents contend, that the complaint should have alleged that the negligence of the defendant driver was wilful and intentional, or that he knew or could reasonably have anticipated his negligence would cause the particular injuries set forth in the complaint.

[4-6] It is the rule that the natural and probable consequences of a negligent act or omission are those which should reasonably have been anticipated, but it is sufficient to plead negligence generally, and whether or not the negligence pleaded and the results therefrom are true are questions of fact which cannot be determined upon demurrer. Carroll v. Central Counties Gas Co., 74 Cal.App. 303, 240 P. 53. We are dealing with the allegations as set forth in the complaint and not with the evidence that may be offered.

[7-9] The principal question presented is whether or not under the California rule recovery in damages may be permitted for physical injuries as the result of fright and nervous shock, without bodily contact. In many other jurisdictions the weight of au-

thority is against a recovery where there is no impact. Michell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781, 56 Am.St.Rep. 604; Miller v. Baltimore & O. S. etc. Co., 78 Ohio St. 309, 85 N.E. 499, 18 L.R.A.,N.S., 949, 125 Am. St.Rep. 699; Ewing v. Pittsburgh C. & St. L. Ry. Co., 147 Pa. 40, 23 A. 340, 14 L.R.A. 666, 30 Am.St.Rep. 709; Freedman v. Eastern Mass. St. Ry. Co., Mass., 12 N.E. 2d 739; Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134. This conclusion is reached upon the theory that if recovery cannot be had for fright occasioned by the negligence of another, the consequences of the shock do not fall within the rule of proximate damages. In other words, that the injury is too remote. But this raises a question of fact and it is for the trier of facts to determine whether or not physical injury following shock is a direct and natural effect of mental shock. The fright must be accompanied by fear of immediate personal injury, and physical injury must occur. Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675. It is not necessary here to discuss the rights of a third party to recover for fright or shock followed by physical injury to another. Easton v. United Trade School Con. Co., 173 Cal. 199, 159 P. 597, L.R.A.1917A, 394; Lindley v. Knowlton, 179 Cal. 298, 176 P. 440; Razzo v. Varni, 81 Cal. 289, 22 P. 848. Fright alone is not an "injury" that may be the basis of a claim for damages, but physical injury due to fright is compensable. Clough v. Steen, 3 Cal.App.2d 392, 39 P.2d 889. Causal connection proceeding in an unbroken course from the alleged fright to the alleged physical injury must be shown.

In Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 737, 268 P. 951, 953, the court said: "* * * no matter how negligent a defendant may have been in the abstract, a cause of action is not made out unless that negligence is in some way fastened to the particular injury for which recovery is sought." In Dryden v. Continental Baking Co., 11 Cal.2d 33, 39, 77 P.2d 833, 836, the Supreme Court of this state held: "Furthermore, even were the injuries confined to nervous shock, the right to recover for subsequent disturbances of the nervous system is settled by the decision in Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, at page 680, 44 P. 320, 322, 32 L.R.A. 193, where this court said: 'Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, is thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.' See also, Lindley v. Knowlton, 179 Cal. 298, 176 P. 440. Definite nervous disturbances or disorders, caused by mental shock, excitement, and so on, are classed as physical injuries."

We do not find that any of the points raised by the general or special demurrer are vital to the statement of the cause of action. The judgment is reversed and the cause remanded to the superior court for further proceedings in accordance with the views herein expressed.

We concur: PETERS, P. J.; KNIGHT, J.

---

33 Cal.App.2d 591

**HOFFART et al. v. SOUTHERN PAC. CO. et al.**

**HONIG v. SOUTHERN PAC. CO.**

**Civ. 6122.**

District Court of Appeal, Third District, California.

June 30, 1939.

Rehearing Denied July 29, 1939.

Hearing Denied Aug. 29, 1939.

**1. Railroads 🔑327(12)**

A guest without control, supervision, or management over truck at time of collision with train is not in same legal situation as driver, and duty imposed on guest is not same as that required of driver.

**2. Trial 🔑295(1)**

Instructions would be considered as a whole in determining whether particular instructions improperly failed to make clear their limited application.

**3. Trial 🔑295(7)**

In action against trucker and railroad for death of truck occupant in collision with train, instructions referring to duty of one about to drive over a railroad crossing and others referring to one approaching a railroad crossing, and one about to pass over such crossing, were not prejudicial, when instructions were considered as a whole, because allegedly failing to make clear that they applied to truck driver alone and not to occupant.

4. **Railroads** ⚿330(3)

One approaching a railroad crossing may not assume that proper warning of a train's approach will be given by sounding of bell and blowing of whistle.

5. **Railroads** ⚿351(18)

In action against trucker and railroad for death of truck occupant in collision with train, instruction that one free from negligence, in approaching a railroad crossing, may anticipate compliance by railroad with law requiring ringing of bell and sounding of whistle, was properly rejected.

6. **Railroads** ⚿346(6)

A truck occupant with unobstructed view, who when about 300 feet from railroad crossing and while truck was going at a moderate speed commenced looking back along track parallel to road in direction from which train was approaching, was charged with having seen train which struck truck.

7. **Railroads** ⚿351(2)

In action against trucker and railroad for death of truck occupant in collision with train, where occupant for 300 feet before reaching crossing looked continually with unobstructed view in direction from which train was approaching, while seated on side of truck next to track, instruction that occupant must protest against obvious negligence of driver was not objectionable as being unsupported by evidence that occupant was conscious of impending danger.

8. **Appeal and error** ⚿928(1)

Where no evidence of "after-acquired knowledge" on which instructions relating thereto might be based was pointed out, the District Court of Appeal could assume that there was none.

9. **Appeal and error** ⚿1067

In action against trucker and railroad for death of truck passenger in collision with train, where no evidence of after-acquired knowledge was pointed out, rejection of instructions relating to after-acquired knowledge were not prejudicial.

10. **Trial** ⚿165, 178

On motions by defendant for nonsuit and for a directed verdict, every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence, must be considered as facts proved in favor of plaintiff.

11. **Automobiles** ⚿181(1)

Whether a motorist has been guilty of willful misconduct toward a guest depends on facts of particular case. Vehicle Code, § 403, St.1935, p. 154.

12. **Automobiles** ⚿181(1)

"Willful misconduct" by motorist toward guest is the intentional doing of something in operation of a motor vehicle which should not be done or the intentional failure to do something which should be done under circumstances disclosing knowledge, express or implied, that injury to guest will probably result. Vehicle Code, § 403, St. 1935, p. 154.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

13. **Automobiles** ⚿181(1)

To constitute "willful misconduct" by motorist toward guest, there must be actual knowledge or that which in law is esteemed to be equivalent of actual knowledge of peril to be apprehended from failure to act, coupled with conscious failure to act to the end of averting danger. Vehicle Code, § 403, St.1935, p. 154.

14. **Automobiles** ⚿245(24)

In action against trucker and railroad for death of alleged guest in collision between truck and train which approached crossing from rear of truck on tracks running parallel to road, evidence that approaching train could have been seen for some 1,000 feet from crossing, that trucker slowed down to 5 miles per hour as he approached crossing, that there was nothing to prevent him from seeing approaching train, and that when he started up incline toward track, he "poured the gas on," made out prima facie case of "willful misconduct" against trucker for jury. Vehicle Code, § 403, St.1935, p. 154.

15. **New trial** ⚿6

The granting or denying of motion for new trial rested in trial court's sound discretion.

16. **New trial** ⚿9

In action against trucker and railroad for death of truck occupant in collision with train, where evidence was sufficient to support verdict based on either ordinary negligence or on willful misconduct, granting of plaintiff's motion for new trial on sole issue of damages was not an abuse of discretion as to trucker, notwithstanding alleged inability to determine whether verdict against trucker was based on cause of action for ordinary negligence or on cause of action for willful misconduct. Code Civ.Proc. § 662.

**17. Railroads** ⚿**333(1)**

A trucker who as he approached crossing on road parallel to tracks slowed down and looked to rear for approaching train without anything to obstruct his view, but who when he started up incline toward track "poured the gas on," was barred by his contributory negligence from recovering for damages resulting from collision.

**18. Appeal and error** ⚿**1050(2)**

In action against trucker and railroad for death of truck occupant in collision with train, where wife of occupant testified that trucker had asked occupant to help him obtain gravel, admission of testimony of another witness that trucker had asked witness whether witness was free to work for trucker to prove that occupant was a passenger, was not prejudicial, even if irrelevant.

**19. Appeal and error** ⚿**1050(1)**
**Evidence** ⚿**317(2)**

In action against trucker and railroad for death of truck occupant in collision with train, testimony that another had told witness on afternoon of accident that it was lucky such other did not go with trucker or it might have been him instead of trucker, was hearsay, but admission was not prejudicial.

* * *

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by Catherine Ann Hoffart and another against the Southern Pacific Company and John Honig to recover damages arising out of injuries resulting in death, wherein John Honig filed a cross-complaint against the Southern Pacific Company for damages. A nonsuit was granted as to the cross-action. Verdict was entered in favor of the Southern Pacific Company but against John Honig. A new trial was granted as to defendant Honig on the sole issue of damages. From judgment of nonsuit and from order granting motion for new trial, defendant Honig appeals; from judgment in favor of the Southern Pacific Company, plaintiff appeals.

Affirmed.

Butler, Van Dyke & Harris and Gilford G. Rowland, all of Sacramento, for appellant and cross-complainant.

Armfield & Eddy, of Woodland, for respondent Southern Pac. Co.

Archibald D. McDougall, of Sacramento, and C. C. McDonald, of Woodland, for plaintiffs, appellants and respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought by plaintiffs to recover damages arising out of injuries which resulted in the death of Melchoir V. Hoffart. Defendant Honig filed a cross-complaint to recover damages from the Southern Pacific Company, arising out of the same accident, and as to this cause of action, a nonsuit was granted. The jury denied damages as to defendant Southern Pacific Company, but awarded plaintiffs the sum of $4,486.25 against defendant John Honig. A new trial was granted as to defendant Honig, on the sole issue of damages. The latter now appeals from the judgment on nonsuit entered against him on his cross-complaint, and from the order granting the motion for new trial. Plaintiffs appeal from the judgment in favor of the Southern Pacific Company.

On February 12, 1937, a collision between a train and a truck took place at a railroad crossing located approximately one-half mile northwest of the town of Yolo, in Yolo county. Melchoir V. Hoffart, on account of whose death the action was brought, was riding in the truck driven and owned by defendant John Honig, which, while being operated in a general southerly direction on a county road known as the old Yolo-Zamora Highway, was struck by a train of defendant Southern Pacific Company. The complaint joined the truck-driver John Honig and Southern Pacific Company as defendants, and charged both of these defendants with negligence in their respective operation of the truck and train. In the complaint it was alleged that the deceased was riding in the truck as a passenger". Subsequent to the filing of the complaint, and after the deposition of defendant Honig was taken, plaintiffs obtained leave to file an amendment to the complaint, directed against defendant John Honig, alone, and charging him with wilful misconduct in the operation of his truck at the time of the accident.

Taking up, first, the appeal of plaintiffs from that portion of the judgment which denies them a recovery against defendant Southern Pacific Company, it is based solely upon alleged error in giving, modifying and refusing instructions.

It should be borne in mind that in discussing these instructions we are considering an attack by the surviving heirs of the deceased guest or passenger, and the law pertaining to the duty of a guest or passenger under the circumstances. In this connection a further reference to the facts and the evidence may serve as a background for a more intelligent view of the legal questions which arise. The two men were seated in the cab of the truck, and were driving southerly down a county road which parallels the railroad track for a considerable distance before the crossing is reached, and is about seventy feet distant from the track. This road finally makes a right turn (in respect to this driver), at an angle of some forty degrees, and crosses the track. The train was bound in the same direction, and approaching from the rear of the truck. The view of the track in the direction in which the train approached was absolutely unobstructed for at least one thousand feet. The deceased was sitting on the side of the cab next to the track. The windows and windshield of the truck were clear. The time of the accident was 10:45 in the morning. There is a slight incline approaching the grade crossing. Driver Honig gives the following explanation of the accident: He knew that the tracks were there; the visibility was good; his truck was equipped with four-wheel brakes, in good condition. When the truck was about three hundred feet from the crossing they both stopped talking and were "looking for a train", and witness did that continuously until he reached the crossing; the deceased was also looking in both directions at a point one hundred fifty feet from the crossing, (quoting from the record):

"When I was about three hundred feet from the rail I started to look around for the train, because I was approaching a track and, of course, we were talking until that time and, when I was looking around, of course, *the conversation stopped just like that, because I was not paying any attention; I was looking around and he started to look around at the same time.*

"Mr. Eddy. Just a minute. When you say 'he', do you mean Hoffart? A. I mean Hoffart, of course. * * * And I would look around and he would be looking at the same time, to my right, and I would rare forward to see past him, and I also done it at *one hundred feet from the rail* leaning still further forward and, about fifteen feet from the track, I started to shift into second and looked across and then, when I looked again, while I was going up, I looked again and then it was too late, the train was right on top of us. Now, that is as near as I can tell you. * * *

"Q. Then, was it because you were locked up in the cab that you could not see this railroad track; is that the fact? A. That is about what it would be; I could not see it.

"Q. In other words, it was your own cab that was interfering with your vision, is that correct? A. Yes, and that party that was sitting next to me.

*"Q. But if you had gotten out of the cab; if you had stopped your car and gotten out of the cab, you would not have had any trouble looking up that railroad track for a mile or two? A. Oh, no, not that way."*

As he was going toward the crossing and up the slight incline, the truck was moving at about five miles per hour, and could have been stopped within twenty feet of the tracks. Witness testified that he did not see the train approaching. The deceased gave no outward sign which would indicate that he saw the train. He made no remonstrance, nor did he say anything to the driver to the effect that a train was approaching. During the last three hundred feet traveled by the truck, neither spoke to the other; both were engaged in looking for an approaching train.

[1-3] Several instructions were given relating to the duty of a person approaching a railroad crossing in a vehicle. It is not contended that these instructions incorrectly state the law. Appellants contend, however, that they were correct as to the *driver* of such vehicle only, and that the jury must of necessity have understood them to apply to *both* driver and the deceased, who was riding with him in the same seat, but who had no control over the operation of the truck. It is no doubt the rule that "a guest when not having any control, supervision or management over the automobile, is not placed in the same legal situation as the driver" (Switzler v. Atchison, etc., Ry. Co., 104 Cal.App. 138-144, 285 P. 918, 921), and that "the duty imposed upon a guest riding with another is not the same as that required of the

driver". Scherer v. Southern Pacific Co., 140 Cal.App. 528-534, 35 P.2d 356, 358. We are of the opinion, however, that the only reasonable construction which might be placed upon these instructions would be that they refer to the driver alone, and not to the guest. One refers to the duty of a person "about to *drive* over a railroad crossing". Certainly that does not refer to a *guest*, and could not be reasonably so understood. The other two in question refer to a "person approaching" a railroad crossing, and "a person about to pass over such crossing". The language of the last two mentioned is not as definite as that in the first, but when the instructions are considered as a whole, it is clear that they would be reasonably construed as applicable to the driver alone. For instance, the trial court specifically instructed the jury upon the duty of a guest or passenger under the circumstances:

"It is the law in this State that the negligence of a driver of an automobile is not imputable to a passenger or guest riding with him. Whether a passenger or guest has or has not exercised ordinary care for his own safety in a particular instance is a question of fact for the jury to determine from the evidence. A passenger or guest of a driver of an automobile is not required, as a matter of law under all circumstances, to watch the road and the driver, and hold himself in readiness to give warnings and directions to the driver concerning the dangers of the road. However, such passenger or guest is normally bound to protect against obvious negligence or recklessness of the driver if he had the opportunity to do so, but the extent of his duty in that regard depends upon the particular circumstances in each case. He is bound to exercise ordinary care for his own safety. A person riding in an automobile as a passenger or guest has a right to assume, until the contrary reasonably appears, that the automobile driver will drive in a proper manner and will take the necessary precautions to safeguard the life of his passenger or guest."

We cannot agree with the statement of appellants and plaintiffs to the effect that the court gave no instructions which distinguished between the duty of a *driver* and the duty of a *guest*. The last two instructions very clearly set forth the duty of a guest. It is true that the difference might have been further accentuated by the instructions proposed by appellants, but we cannot see how the jury was confused or misled after the instructions are all read together. Furthermore, it was clearly pointed out to the jury that: "It is the law of this State that the negligence of a driver of an automobile is not imputable to a passenger or guest riding with him." The three instructions under attack called for the performance of some act upon the part of the person *actually operating the vehicle*, and to hold that they were equally applicable to a guest or passenger would be placing a very strained and unreasonable construction upon them. Adding to this the view of the instructions as a whole, we can find no prejudice resulting.

[4, 5] The following instruction was given: "A person about to cross over such crossing cannot rely upon the assumption that the employees operating a train on the track will give the proper warning of approach by sounding the bell and blowing the whistle."

Appellants contend that the foregoing instruction is erroneous, in that the rule applies only where the person about to cross the track is *himself* negligent, and they also predicate error upon the refusal of the court to give an instruction to the effect that one *free from negligence*, in approaching a railroad crossing, *has a right to anticipate* that the law requiring the ringing of a bell and the sounding of a whistle would be complied with. The instruction given correctly stated the law, and the proposed instruction was properly rejected. As stated in Hutson v. Southern California R. Co., 150 Cal. 701-703, 89 P. 1093, 1094: *"It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation."*

[6, 7] The court gave the following portion of one of plaintiffs' proposed instructions: "A passenger or guest of a driver of an automobile is not required, as a matter of law under all circumstances, to watch the road and the driver and hold himself in readiness to give warnings and directions to the driver concerning the dangers of the road."

The court qualified this instruction, however, by adding thereto the following: "However, such passenger or guest is normally bound to protest against obvious negligence or recklessness of the driver if he has the opportunity to do so, but the extent of his duty in that regard depends upon the particular circumstances in each case. He is bound to exercise ordinary care for his own safety."

Appellants contend that this is a proper statement of the law, but that the instruction has no support in the evidence, in that there is no proof that deceased was *conscious of impending danger.* Citing Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529. We believe that this question has been fully answered, adversely to plaintiffs. There is evidence from which the jury could reasonably infer that the deceased was conscious of impending danger. For three hundred feet, and while the truck was going at a very moderate speed, he looked continually up the track in the direction from which the train was approaching, with an absolutely unobstructed view. He was seated on the side of the truck next to the track. Having looked, under such circumstances, he will be charged with having seen. Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622. There is evidence that the bell of the locomotive was ringing and the whistle blowing some seven hundred feet from the crossing. The last seventy feet traversed by the truck were not parallel to the track, but at a considerable angle—forty degrees. The train was approaching from his side of the truck. The cases cited by appellants upon this question can be distinguished upon the facts, and as stated in Wagner v. Atchison, etc., Ry. Co., 210 Cal. 526–528, 292 P. 645, 646, referring to a guest: "The extent of his duty depends upon the particular circumstances of each case, and is a question for the jury."

[8, 9] Finally, instructions were rejected by the court relating to "after acquired knowledge", and directing the jury to disregard such evidence in respect to the conduct of *deceased.* The court gave an instruction confining the scope of the evidence to the time of, and before the accident, with reference to the negligence of *defendants.* No evidence of such "after acquired knowledge" is pointed out, and we can assume that there was none. If the *plaintiffs* were deprived of the benefit of this rule, no prejudice is shown.

We conclude a discussion of this appeal by a quotation from the case of Parker v. Southern Pacific Co., 204 Cal. 609-614, 269 P. 622, 624, which is factually very similar to this case, and which sustains the trial court in most of the rulings in respect to the instructions: "Notwithstanding her realization that a train might be approaching on the main track, and that the driver might, by starting up her car to cross that track, plunge the party, including the plaintiff, into the jaws of death, she made no remonstrance and uttered no warning to the driver of the danger in entering upon the perilous position on the track. *It is impossible to lay down a general rule as a test of a passenger's responsibility under such circumstances.* At times it might be highly improper to suggest any course of action on the part of the driver. At other times the circumstances might be such as to charge the passenger with some duty to suggest caution or otherwise endeavor to protect himself. See Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; Stewart v. San Joaquin L. & P. Corp., 44 Cal.App. 202, 186 P. 160. *Each case must rest upon its own set of facts,* and the determination of those facts, as a general rule, is one for the jury. Stewart v. San Joaquin L. & P. Corp., supra. *On the record before us it cannot be said that the jury might not find that the plaintiff was in some degree at fault in not apprising the driver of the impending danger."* (Italics ours.)

Coming now to the appeal of defendant Honig: Two causes of action were stated against him—one based upon the relationship of passenger, which would require evidence of ordinary negligence only, and one based upon the relationship of guest, which requires proof of wilful misconduct on his part. Both causes of action were submitted to the jury for determination. A motion for a directed verdict by this defendant on the cause of action based upon wilful misconduct, was denied. The same ruling was made upon a motion for nonsuit upon the cause of action based upon ordinary negligence. After verdict this defendant moved for judgment notwithstanding the verdict, reserving the right to move for a new trial, upon the grounds theretofore urged in support of the motion for directed verdict, that is, that, first, there was no evidence to support a finding of wilful misconduct on the part of the defendant Honig; and, second, there was no evidence to support a finding by the jury that Hoffart, the deceased, was a passenger and not a guest, thereby giving the plaintiffs a right to recover for ordinary neglect in the operation of Honig's truck. This motion was denied. Thereupon, plaintiffs moved the court for a new trial as to defendant, John Honig, as to the issue of damages alone, which motion was granted.

[10] It is not denied that if the evidence supports a finding on either cause

of action, the verdict must be sustained. Appellants first contend that the court erred in refusing to grant defendant's motion for nonsuit and his motion for a directed verdict as to the *second* cause of action, based upon *wilful misconduct.* It therefore becomes necessary to inquire into the sufficiency of the evidence, bearing in mind that upon motions of this character every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts proved in favor of plaintiff.

[11-14] We are of the opinion that a prima facie case of "wilful misconduct" was made out, under the provisions of Vehicle Code, § 403, St.1935, p. 154. Proof of wilful misconduct depends upon the facts of each particular case. Candini v. Hiatt, 9 Cal.App.2d 679, 50 P.2d 843; Hagglund v. Nelson, 23 Cal.App.2d 348, 73 P.2d 265. Wilful misconduct has been defined as intentionally doing something in the operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988. To constitute wilful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279. The foregoing definition was approved by this court in the case of Haas v. Jones, 85 P.2d 579. The approaching train could have been seen for some one thousand feet from the scene of the accident. As the driver approached the crossing he slowed down to five miles an hour, and shifted into second gear. He knew the crossing was there, for some distance before he was struck by the train. The accident happened at 10:30 in the morning. When he shifted gears he determined to cross the track. He testified that there was nothing to prevent him from seeing the approaching train. When he started up the incline toward the track he "poured the gas on". Other facts are detailed in our discussion of plaintiffs' appeal. In Koster v. Southern Pacific Co., 207 Cal. 753-762, 279 P. 788, 792, it is said: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him."

The evidence is ample to justify a finding that the action of the driver in crossing the tracks in front of the approaching train was either a deliberate attempt to beat the train across, or that he proceeded onto the crossing in wanton and reckless disregard to the safety of the deceased. In Hagglund v. Nelson, 23 Cal.App.2d 348-351, 73 P.2d 265, 267, it is said: "Such conduct may not be said to amount to mere lack of judgment. *It was a willful and reckless disregard for human life.* Under such circumstances it was the province of the trial court to determine whether such conduct was the result of a mere mistake of judgment, or whether on the contrary it constituted willful misconduct on the part of the driver of the machine. *With that province we may not interfere under the facts of this case.* * * * In the present case we are satisfied the defendant did not drive his automobile directly in front of the rapidly approaching passenger train with the deliberate intention of injuring his guest, but we are convinced *that he did act with wanton and reckless disregard of the consequences of his conduct with knowledge, or the possession of facts which were equivalent to actual knowledge, that injury to his guest was likely to occur. Such conduct renders him guilty of willful misconduct.*"

Both motions were properly denied.

[15, 16] It is contended that the court erred in granting plaintiffs' motion for a new trial on the sole issue of damages. It was urged by plaintiffs, in support of said motion, that the amount of damages was *grossly inadequate.* The attack is based more upon a matter of policy than from a legal point of view. The authority of the court to grant a new trial upon a limited issue is not questioned by this appellant. It is expressly conferred by section 662 of the Code of Civil Procedure. It is further conceded that the granting or denial of the motion rested in the sound discretion of the court. The verdict was general. Appellant complains because he cannot now determine whether the verdict was based upon the cause of action for ordinary negligence, or the cause of action based upon wilful misconduct—admittedly inconsistent in their nature. The right to submit such inconsistent issues is not con-

troverted. If there was sufficient evidence to sustain a finding on *either* causes of action (as we have held), we regard the matter as finally concluded here. "The rule is settled in this state that, where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 525, 47 P. 364, 778; Estate of Hellier, 169 Cal. 77, 83, 145 P. 1008; Sessions v. Pacific Imp. Co., 57 Cal.App. 1, 27, 206 P. 653; Walton v. Southern Pac. Co., 8 Cal.App.2d 290, 305, 48 P.2d 108. When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues. Big Three Min. & Mill. Co. v. Hamilton, 157 Cal. 130, 141, 107 P. 301, 137 Am.St.Rep. 118." Hume v. Fresno Irr. Dist. 21 Cal.App.2d 348-357, 69 P.2d 483, 488. The authority of the trial court to grant a new trial upon a part of the issues is an expedient which has received the approval of many interested in the proper and prompt administration of justice. It has resulted in a great saving of time and expense to litigants. There may be occasions, as indicated by the cases cited by appellants, when the procedure works a hardship, but those are exceptional. If the evidence of liability is sufficient (as we hold it to be in this case), why go to the expense and trouble of retrying *all* the issues? Because the verdict is smaller than the trial judge believes is justified by the evidence, it does not necessarily follow, as counsel for appellant contends, that the jury *never did* determine the liability, and that the verdict was the result of a compromise. If, as here, there was sufficient evidence to support a verdict on *either* causes of action, it is conceded by appellant that the granting of the motion was not an abuse of discretion. As to the position of the trial court, it may be assumed that it was as familiar with the law as an appellate court. It was satisfied that there was evidence sufficient to establish liability upon the part of Honig. Appellant states that from the state of this record the trial court could not know upon what ground the jury based its finding of liability, and therefore could not know and could not rightly judge the merits of plaintiff's motion for a new trial on that issue. The answer to this is that the court would *never* know, and the law does not contemplate that it should. A retrial upon all issues would not alter this condition. The only concern of the trial court was whether or not there was evidence sufficient to establish the liability of appellant upon *either* causes of action. We have held that there was, and of course the trial court must have entertained the same view. There was no abuse of discretion in granting the motion.

The giving of the following instruction is counted upon as error: "A person about to cross over such crossing cannot rely upon the assumption that the employees operating a train on the track will give the proper warnings of approach by sounding the bell and blowing the whistle. A person must look and listen even though he hears no such warnings of approach."

This instruction is a correct statement of the law. Hutson v. Southern Pacific Ry. Co., 150 Cal. 701, 89 P. 1093; Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788. It is contended, however, that this instruction would reasonably be understood by the jury as having application not only to the driver, but to a passenger or guest, and that a different rule applies with reference to the latter two. It is unnecessary to inquire into such difference. The discussion of the preceding instructions above covers the situation here. We are satisfied that this instruction should be reasonably construed as being applicable to the party in charge of the operation of the vehicle—the driver. What we have said in this connection in our discussion of the instructions referred to above is equally in point here, and it is unnecessary to repeat it. Assuming that the view of appellant is correct, and that the instruction would only be proper in a case where there was evidence of negligence on the part of *deceased*, we believe it was justified by the record here.

Complaint is made of the action of the court in refusing to give an instruction on the subject of contributory negligence upon the part of the deceased guest. We find that the court gave an instruction upon this subject, but such instruction is characterized as a "bare definition", and it is urged that there should have been greater elaboration on the facts. While the *proposed* instruction might well have been given for the purpose of clarity and precision in relation to the facts, the instruction *given* fully stated the law, and no prejudice resulted from its brevity. A second instruction on the same subject was also refused, and what we have said above is also applicable to it.

[17] It is urged that the court erred in granting the motion of defendant Southern Pacific Company for a nonsuit as to this defendant. From what we have said above, it clearly appears that this appellant was guilty of contributory negligence as a matter of law, and the trial court properly granted the motion.

[18, 19] Finally, it is contended that the trial court erred in admitting the testimony of witness Mehrer, concerning a conversation had with appellant prior to the accident, to the effect that Honig asked him (the witness) if he was free to go to work for Honig in the matter of getting gravel. We assume that plaintiffs sought to elicit this testimony for the purpose of proving that deceased was a passenger. Complaint is also made that witness Willis was permitted to detail a conversation with witness Mehrer on the afternoon of the accident, when the latter stated that it was lucky he did not go with Honig that morning or it might have been him instead of Hoffart (the deceased). During the trial, the wife of decedent testified that Honig had asked deceased to help him obtain gravel (they were on their way to obtain gravel at the time of the accident). It is contended that the first conversation was irrelevant. We are doubtful of its relevancy, but as the wife had positively testified that appellant had asked deceased to help him, it was merely cumulative evidence, and without prejudicial effect. The second conversation was clearly hearsay, but of such trivial evidentiary value or effect that it could scarcely be held prejudicial.

An examination of the entire record shows that in spite of the various conflicting interests, the case was fairly tried, and that the jury was fairly and fully instructed.

The judgments and order appealed from are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

## On Petition for Rehearing.

Our attention has been called by appellants to a certain inaccuracy in the statement of facts appearing in the opinion. We stated that the road which was traversed by the truck paralleled the railroad and then turned to the right and crossed the track. The record shows that the road does not run parallel to the track, but approaches the track in a straight line at an angle of 40 degrees. The state highway parallels the railroad on the opposite side of the track. It would appear, however, that the inaccuracy mentioned was more favorable to appellants than the correction which we here make. The visibility of the driver and passenger or guest was far better when approaching the track at an angle, than it would be in a parallel position, as in the latter situation the train would be approaching directly from the rear of the truck.

It is hereby ordered that the portion of the second paragraph on page 3 of the opinion (and as is reported in 92 P.2d at page 439 first column, beginning in the 26th line), commencing with the words "The two men" and ending with the words "from the rear of the truck" be stricken out, and the following substituted in lieu thereof: "The two men were seated in the cab of the truck, and were driving along a county road which runs southerly in a straight line, intersecting the track at an angle of forty degrees. The train was approaching from the north, so that both train and truck were converging upon the crossing, southward bound."

It is ordered that the opinion be modified as indicated, and that a rehearing be denied.

33 Cal.App.2d 543

## FOSTER v. CAREY et al.

Civ. 2347.

District Court of Appeal, Fourth District, California.

June 27, 1939.

**Appeal and error 🔑627(2)**

Where only papers before Court of Appeals were those filed on motion to dismiss appeal which included a certificate of county clerk which showed that judgment was rendered for defendant on August 25, 1938, that notice of appeal was filed on November 4, 1938, that no clerk nor reporter's transcript nor bill of exceptions were ever prepared and that on April 28, 1938, Superior Court terminated all proceedings for preparation of a record on appeal, appeal was dismissed.

---

Appeal from Superior Court, Imperial County.

Action by J. J. Foster, also known as John J. Foster, against S. D. Carey and another, as acting assignees and trustees for the benefit of creditors of John J. Foster, doing business under the style of Brawley Steam Laundry Company, and others. From a judgment for the defendants, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Hugh S. MacKinnon, of Calexico, for appellant.

Hickox & Provence and Harry W. Horton, all of El Centro, W. I. Wilson and Arthur E. Skeats, in pro. per., Samuel T. Bush, of San Francisco, and Ticknor & Maxwell, of Pasadena, for respondents.

MARKS, Justice.

This is a motion to dismiss this appeal from a judgment of the superior court of Imperial county.

Nothing has been filed here except the papers on this motion, which include a certificate of the county clerk of Imperial county which shows that judgment was rendered for defendant on August 25, 1938; that notice of appeal was filed on November 4, 1938; that no clerk's nor reporter's transcripts nor bill of exceptions were ever prepared; that on April 28, 1939, the superior court of Imperial county terminated all proceedings for the preparation of a record on appeal.

The appeal is dismissed.

I concur: BARNARD, P. J.

---

33 Cal.App.2d 578

## PEOPLE v. WYNN.

Cr. 385.

District Court of Appeal, Fourth District, California.

June 29, 1939.

**Homicide** ⚿253(1)

Evidence sustained conviction for murder in first degree. Pen.Code, § 1016.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Robert Wynn was convicted of murder in the first degree, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., and Russell S. Waite, Deputy Dist. Atty., both of Riverside, for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced upon defendant sentencing him to life imprisonment for the murder of his wife.

Defendant was charged with murder in the first degree. He entered pleas of guilty, and not guilty by reason of insanity. A jury found him sane. It was stipulated that the evidence in the trial on the question of his sanity might be considered in fixing the degree of the crime. When the trial judge found him guilty of murder in the first degree and sentenced him to be imprisoned for life, this appeal followed.

By the foregoing recitation of the procedure permitted in this case we do not wish to be understood as intimating that a defendant should be permitted to enter the pleas of guilty, and not guilty, by reason of insanity. See sec. 1016, Pen.Code; People v. French, Cal.Sup., 87 P.2d 1014; People v. Pincus, 131 Cal.App. 607, 21 P.2d 964; People v. Morgan, 9 Cal.App.2d 612, 50 P.2d 1061. That question is not presented for decision here.

Defendant presents but one question on this appeal, namely, the sufficiency of the evidence to sustain the finding that he was guilty of murder in the first degree. He urges that we should reduce the crime to manslaughter, or, at most, murder in the second degree. His argument is divided into two phases, (1) that defendant was too intoxicated at the time of the killing to entertain an intent to kill, and (2) that defendant and his wife, his victim, had lived in conjugal bliss for fifteen years and there was no evidence justifying the conclusion of the trial judge that the killing was done with malice aforethought.

The evidence on the question of defendant's intoxication at and before the time of the killing is conflicting. Several witnesses testified that while he had been drinking, and was not perfectly sober, he was not drunk. As one witness put it, "He wasn't drunk. * * * He had been drinking, yes, sir, but he wasn't plumb under the influence." Defendant's actions and conversation for several hours prior to and at the time of the killing were detailed with great particularity. This testimony is strong evidence that while he was mildly intoxicated, he was not so drunk as to preclude him from forming a specific intent to kill. Because some witnesses swore to a greater degree of intoxication is not sufficient to permit us to upset the implied finding that defendant was capable of and did entertain a specific intent to kill his wife when he shot her. People v. Morales, 26 Cal.App.2d 442, 79 P.2d 771.

There is overwhelming evidence in the record upholding the conclusion that the killing was done with malice aforethought.

Defendant was a farmer living near Blythe in Riverside county. He went hunting on Saturday afternoon, October 1, 1938, taking with him a twenty-two rifle and a small gauge shotgun. Upon his return home he left one of the guns there. He also owned a .30-30 repeating rifle which he kept in his house. This gun was not taken on the hunting trip.

During the early evening of October 1st, defendant drove his wife, his daughter and a friend to Blythe. The .30-30 rifle was not in defendant's automobile on this trip. He sent his wife and daughter to a picture show while he spent the evening with friends drinking wine and beer. Mr. and Mrs. Wynn met after the show and an altercation followed. At about midnight defendant went home. Later he returned to Blythe and had with him the .30-30 rifle. He went to a service station to await a police officer whom his wife had called after the altercation. At that time Mrs. Wynn and her daughter were hiding in the service station rest room. They came out of their hiding place when the police officer arrived. Mr. and Mrs. Wynn and the officer talked over the quarrel. The policeman believed Wynn was sufficiently quieted so that he would not continue the quarrel. The officer told defendant to take his wife and daughter and go home. The officer left the service station and went on about his business.

Mrs. Wynn had been contemplating leaving defendant because of his drunkenness and abuse of herself and their daughter. She refused to go home with him and started down the street towards a restaurant. Wynn followed in his automobile. As Mrs. Wynn and her daughter hurried into the restaurant Wynn fired one shot at his wife, missing her. She ran to the rear of the restaurant and hid in a small closet. Wynn followed her there, took deliberate aim at her with his rifle and killed her.

The foregoing is a brief summary of part of the evidence which supports the judgment of the trial court. There can be no doubt that defendant committed a deliberate premeditated murder with malice aforethought and is guilty of murder in the first degree.

The judgment is affirmed.

I concur: BARNARD, P. J.

---

33 Cal.App.2d 507

**LITTLE v. BUCKEL et al.**

**Civ. 2338.**

**District Court of Appeal, Fourth District, California.**

**June 26, 1939.**

**Hearing Denied Aug. 24, 1939.**

**1. Chattel mortgages ⇨32**

Where debtors, unable to meet demands of holders of trust deed, conveyed property to plaintiff who took deed to property, paid part of debt, gave new trust deed for remainder and gave debtors option to repurchase and took note and chattel mortgage, in determining whether note was to be paid only in event debtors exercised option, court was called on to so interpret all parts of the transaction as to give effect to the intention of the parties.

**2. Chattel mortgages ⇨106**

Where debtors were unable to meet demands of holders of trust deed, plaintiff took deed to property, paid part of debt, gave new trust deed for remainder, gave debtors option to repurchase land and took note and chattel mortgage for amount paid holders of trust deed, evidence sustained finding that note was not to be paid unless option was exercised.

**3. Chattel mortgages** ⚷111

Where debtors were unable to meet demands of holders of trust deed, plaintiff took deed to property, paid part of debt, gave new trust deed for remainder, gave debtors option to repurchase land and took note and chattel mortgage for amount paid holders of trust deed, plaintiff cancelling option because of failure to comply with terms thereof could not recover on note which was not to be paid unless option was exercised.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action on a note and to foreclose a chattel mortgage by J. M. Little against L. J. Buckel and others. From an adverse judgment plaintiff appeals.

Affirmed.

Hickcox & Provence, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an action on a promissory note and to foreclose a chattel mortgage. The complaint alleges the execution by L. J. Buckel, Fred Buckel and Irene Buckel of a promissory note for $4,500 dated January 21, 1930, $1,500 being payable in one year, $1,500 in two years and $1,500 in three years, after date, and reciting that it is secured by a chattel mortgage. It is then alleged that to secure said note "L. J. Buckel" gave a chattel mortgage dated March 5, 1934. The prayer is for foreclosure and judgment against all three of these defendants, who will be referred to herein as the defendants since the rights of other defendants are not involved.

Prior to January, 1930, the defendants were the owners and in possession of 100 acres of land in Imperial county which was subject to a trust deed securing a debt of $16,000, of which $4,500 was delinquent. On January 21, 1930, pursuant to an agreement of the parties, the plaintiff took a deed to the property, paid the overdue $4,500, executed a new trust deed to secure the balance of $11,500, and gave the defendants a written option to purchase the property from him by repaying the $4,500 within three years, assuming the $11,500 trust deed, and repaying any other expenses which he had incurred. On the same day the note set forth in the complaint was given to the plaintiff, together with a chattel mortgage executed by all three defendants.

The defendant L. J. Buckel occupied the west fifty acres of the land and the other defendants the remainder. On March 28, 1930, the defendants executed a five-year lease on the west fifty acres to a third party for a total rental of $7,500. On August 12, 1931, the first instalment of the note not having been paid, the plaintiff secured from L. J. Buckel an assignment of this lease. On October 30, 1931, the plaintiff recorded an acknowledgment of full payment and satisfaction of the chattel mortgage dated January 21, 1930, and of the note secured thereby, being the note described and set forth in the complaint in this action. It seems, however, that on October 26, 1931, F. G. Buckel and Irene Buckel had given another chattel mortgage securing the note here in question. On October 22, 1932, L. J. Buckel gave the plaintiff another chattel mortgage securing this note, which was released by the plaintiff on March 5, 1934, the release stating that the mortgage, with the debt secured thereby, "is fully paid, satisfied and discharged". On March 5, 1934, L. J. Buckel executed another chattel mortgage in favor of the plaintiff purporting to secure this note. The court found, however, that this chattel mortgage was executed at the request of a bank in connection with a transaction between L. J. Buckel and the bank, and that its execution was unknown to the plaintiff and was not for his benefit.

On March 25, 1932, the second instalment of the note in question not having been paid, the plaintiff brought an action against Fred Buckel and Irene Buckel alleging that since January 22, 1932 (the day after the second instalment of the note became due), he had been the owner and entitled to the possession of the east fifty acres of this land and that since that date they had unlawfully withheld the possession of the land from him. On May 9, 1933, judgment was entered giving him possession of the land with the rental value thereof from January 22, 1932.

In the present action, which was filed on December 3, 1935, the court found that a complete satisfaction and release of the original chattel mortgage and the note secured thereby was filed on October 30, 1931, and that a complete release and satisfaction of the original note and a subsequent chattel mortgage given to secure it was recorded on March 5, 1934. The court further found that in 1931 the plaintiff procured from the defendant L. J. Buckel the possession of one-half of the real property, with an assignment of the existing lease thereon; that thereafter the plaintiff demanded the possession of the other half of the premises from the defendants Fred Buckel and Irene Buckel and secured a judgment giving him such possession; that the plaintiff had repudiated the option and demanded and secured possession of the real property; that the note here involved was subject to the terms and provisions of the option to purchase said land, and to be paid only when and if said option was exercised; that the option, note and chattel mortgage were all parts of one transaction; that the only consideration for the note was $4,500 which was to be paid when and if the option was exercised; that the option was never exercised; and that the consideration had wholly failed.

[1] In effect, the court found that the note sued upon was not to be paid unless the option to purchase the land was exercised. The only question requiring consideration is whether the evidence sustains the findings to this effect. When the transaction arose the defendants were unable to meet the demands of the holders of the trust deed upon their property. The plaintiff took a deed to the property, paid part of the debt, gave a new trust deed for the remainder, gave the defendants an option to repurchase the land, and took a note and chattel mortgage. F. J. Buckel and Irene Buckel contended, in the suit brought against them in 1932 by the plaintiff, that the transaction was merely security for $4,500 loaned them by the plaintiff. The court in that action held otherwise and the judgment became final. That part of the transaction which gave the defendants the option to pay the $4,500 is somewhat inconsistent with the other part represented by the note and chattel mortgage. There is nothing to indicate that the note was given as consideration for the giving of the option, and the court found that both were parts of one transaction. The court was called upon to so interpret all parts of the transaction as to give effect to the intention of the parties. It is a reasonable inference that the purpose of the transaction was to give the defendants time in which to take care of the pressing part of their debt and if they were able to do so within that time to enable them to keep the land. The general facts and much of the evidence justify and support an inference that, as found by the court, it was the intention of the parties that the note was to be paid only in the event the option was exercised.

[2,3] The acts and conduct of the plaintiff and his own testimony furnish further support for the court's findings. He testified that there was only one transaction and that the $4,500 represented by the note and chattel mortgage was the same $4,500 which the Buckels were to pay if they exercised the option to purchase the property. His actions are particularly significant. He demanded and secured possession of one-half of the land in 1931, when the first payment of $1,500 called for by the note was not paid. He demanded and secured possession of the remainder of the land immediately upon a default in the payment of the second instalment of the note. The option itself was conditioned upon the payment of $4,500, with interest and advances, at any time within three years and nothing was said therein about annual payments. Such provisions were contained only in the note. He took possession of the land when a part of the note was not paid, although the option itself gave a longer period for payment. From the conduct of the plaintiff it thus appears that he considered the note as a part of the option agreement, that he considered the failure to pay the annual instalments of the note as a violation of the option, and that he acted accordingly. After proceeding on this theory and, in effect, canceling the option because of a failure to comply with a part of its terms, he did nothing further until this action was brought, more than three years later. The evidence supports the court's findings to the effect that under the agreement of the parties the note was not to be paid unless the option was exercised.

The judgment is affirmed.

I concur: MARKS, J.

33 Cal.App.2d 402

## JACK v. WONG SHEE et al.

Civ. 11025.

District Court of Appeal, First District, Division 2, California.

June 19, 1939.

Hearing Denied Aug. 17, 1939.

**1. Mortgages 🔑25(6)**

In mortgage foreclosure suit, evidence justified finding that plaintiff's mortgage and note were supported by consideration.

**2. Subrogation 🔑23(1)**

A mortgagee could not assert right of holder of trust deed to subrogation to position held under prior trust deed merely because trust deed was reconveyed on same day that mortgagee's trust deed was recorded in absence of showing that mortgagee became holder of rights under deed of trust.

**3. Subrogation 🔑33(2)**

The purchaser and assignee of a note secured by trust deed was entitled to assert whatever right of subrogation the assignor was entitled to assert.

**4. Subrogation 🔑23(4)**

A mortgagee which advanced money by which debt secured by trust deed constituting first lien had been paid on faith of obtaining first lien which expectation had been defeated by intervention of second mortgage was entitled to subrogation to rights of holder of deed of trust constituting first lien.

**5. Subrogation 🔑23(4)**

The mere existence of notice of an intervening lien is not of itself sufficient to defeat junior encumbrancer's right of subrogation to rights of a senior encumbrancer, but the junior encumbrancer may still be entitled to subrogation if for any reason he innocently and without negligence believed that the intervening lien of which he had notice was no longer an existing lien on the property.

**6. Subrogation 🔑38**

Subrogation will not be granted to a junior encumbrancer who negligently fails to learn that there is an existing intervening lien.

**7. Subrogation 🔑23(4)**

Notice of intervening second mortgage to mortgagee advancing money to pay first lien on faith of obtaining first lien did not defeat mortgagee's right to subrogation where mortgagee relied on release of second mortgage which was signed and duly acknowledged, notwithstanding that release was a forgery and hence had no effect on validity of mortgage, in absence of showing of any reason for belief that release was invalid.

**8. Subrogation 🔑41(1)**

The right of subrogation is not one which a party may assert by his own action but is one which may be asserted only in a civil action.

**9. Subrogation 🔑35**

The right of subrogation may be waived.

**10. Subrogation 🔑35**

The assignees of a trust deed given to secure the payment of money part of which was used to discharge prior trust deed constituting first lien waived right, if any, to subrogation to rights of holders of trust deed constituting first lien, where assignees claimed title acquired at sale under trust deed assigned to them on which amount due was in excess of that due under trust deed constituting first lien at time of its satisfaction.

**11. Subrogation 🔑33(2)**

Under a right of subrogation, the junior encumbrancer is entitled to occupy only the position of the senior encumbrancer and no better position.

**12. Mortgages 🔑199(2)**

An assignment of rents given to secure indebtedness evidenced by note secured by trust deed ceased to constitute lien on property after indebtedness evidenced by note was paid.

**13. Executors and administrators 🔑228(5)**

In suit against administratrix to foreclose trust deed of deceased mortgagor, due presentation of claim was admitted by administratrix by reason of failure to so deny. Probate Code, § 706; Code Civ.Proc. § 462.

**14. Executors and administrators 🔑228(4)**

In suit to foreclose trust deed of deceased mortgagor, evidence justified finding that at time of presentation of claim, plaintiff presented original note and mortgage to administratrix. Probate Code, § 706.

**15. Appeal and error 🔑994(3)**

It is not the province of the Court of Appeal to determine the credibility of witnesses.

**16. Executors and administrators 🔑228(5)**

The presentation of original note and mortgage to administratrix of deceased mortgagor at time claim was presented to her was sufficient to cure any defect in claim arising from failure to attach copy of note and to refer to record of mortgage. Probate Code, § 706.

**17. Pleading** ⚷352

In trust deed foreclosure suit wherein defendants pleaded release of mortgage, motion to strike from files affidavits denying execution of release which were filed after lapse of more than 10 days from receipt of answer was properly denied where affidavits were filed within period of time for pleading as extended by stipulation. Code Civ. Proc. § 1054.

**18. Mortgages** ⚷578

In suit to foreclose trust deed of deceased mortgagor, admission of testimony of mortgagee to matters occurring before death of mortgagor to show consideration for note and existence of indebtedness was not prejudicial where defendants offered no evidence to prove that note lacked consideration or that there was no indebtedness, since note itself was presumptive evidence of consideration and production of note gave rise to presumption that indebtedness evidenced thereby had not been paid. Code Civ.Proc. § 1880, subd. 3; § 1963, subds. 21, 39; Civ.Code § 1614.

**19. Husband and wife** ⚷267(4)

The right of a wife to avoid mortgage executed by husband and not signed by wife was to be determined by provisions of statute as it read in 1924 when property was acquired by husband. Civ.Code § 172a, as added by St.1917, p. 829.

**20. Husband and wife** ⚷265

The husband has the management and control of the community of real property.

**21. Husband and wife** ⚷267(7)

Conveyance by husband in which wife did not join of realty acquired by husband in 1924 was not void but was merely voidable and would be treated as valid until avoided by the wife. Civ.Code § 172a, as added by St.1917, p. 829.

**22. Mortgages** ⚷578

In suit to foreclose husband's mortgage on realty acquired by husband in 1924, defendants other than wife, who was joined as administratrix of estate of husband and individually, could not complain of error if any in failure of trial court to avoid mortgage because of failure of wife to join therein where wife did not appeal since wife was only person who had right to avoid mortgage for such cause. Civ.Code, § 172a, as added by St.1917, p. 829.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Mortgage foreclosure suit by Louie Jack against Wong Shee, also known as Wong See, individually and as administratrix of the estate of Loui Hoy, deceased, and the Shoong Investment Company and others. Judgment for plaintiff and defendants the Shoong Investment Company and others appeal.

Affirmed.

Gavin McNab and Schmulowitz, Aikins & Wyman, of San Francisco, for appellants Shoong Inv. Co., Rose Shoong, and Nat. Schmulowitz.

Edward Eliassen, of Oakland, for appellant Mercantile Mortgage Co.

Brobeck, Phleger & Harrison, of San Francisco, for appellant American Trust Co.

Charles A. Christin, of San Francisco, for appellant Madison & Burke.

Tobin & Tobin and Geo. A. Clough, all of San Francisco, for other appellants.

Leo J. McEnerney, Leslie C. Gillen, Philip R. McEnerney, and J. Bruce Fratis, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff instituted the present action to foreclose a mortgage given him by Loui Hoy, now deceased, upon certain real property located at the corner of Jackson and Stockton streets, in the city of San Francisco. The defendants, The Shoong Investment Co., Rose Shoong, Nat Schmulowitz, as trustee for The Shoong Investment Co., Mercantile Mortgage Co., American Trust Co., as trustee for the Mercantile Mortgage Co., and Madison & Burke, as trustees, for The Shoong Investment Co., have appealed from the judgment in favor of plaintiff decreeing a foreclosure of his mortgage and sale of the property. Wong Shee, the alleged wife of Loui Hoy, was made a party defendant both individually and as administratrix of the estate of Loui Hoy, but she has not appealed from the judgment.

[1] The findings, which are for the most part unattacked by appellants, show the following transactions concerning the property herein involved: The real property involved was conveyed to Loui Hoy on September 18, 1924, by a deed, duly recorded, from Joe Shoong and Rose Shoong. Record title stood in the name of Loui Hoy. On October 11, 1926, Loui Hoy and Wong Shee, as his wife, executed two promissory notes in favor of the Mercantile Trust Co. to evidence a total debt of $40,000. A trust deed to secure said notes was executed by Loui Hoy and Wong Shee and was recorded on November 10, 1926, and will be hereafter referred to as the Mercantile Trust Co. trust deed. On November 1, 1926, Loui Hoy borrowed $15,000 from John Kepner and executed two promissory notes totaling that amount. He and Wong Shee executed a trust deed in favor of John Kepner, as beneficiary, on the same date, and said trust deed, hereafter referred to as the first Kepner trust deed, was recorded November 10, 1926. It constituted a second lien on the property. On March 2, 1928, Loui Hoy executed a note and mortgage, hereafter referred to as the Jack mortgage, in favor of Louie Jack to secure a sum of $22,500. Wong Shee did not sign either the note or mortgage. The mortgage was duly recorded April 26, 1928. While the defendants attack the finding of the court that said mortgage secured a sum of $22,500, previously advanced to Loui Hoy by Louie Jack, as unsupported by the evidence, it will suffice to say at this time that there is sufficient evidence to support the finding, and it appears that there was a consideration for the note and mortgage so executed.

It thus appears that on June 16, 1928, the title to the real property involved stood of record in the name of Loui Hoy subject to a first lien in favor of the Mercantile Trust Co., a second lien in favor of John Kepner, and a third lien in favor of the plaintiff Louie Jack. On said date, there was due and owing to the Mercantile Trust Co. on its trust deed the sum of $38,200 principal and $101.88 accrued interest, and to John Kepner on his trust deed, the sum of $10,150. No part of the debt to Louie Jack had been paid. Sometime prior to June 16, 1928, Loui Hoy applied to the Mercantile Mortgage Co. for a loan of $51,500 to be secured by a trust deed on the property involved. The application for the loan and the acceptance both show that the trust deed to be executed was intended to be a first lien upon the real property. A preliminary report of title was delivered by the City Title Insurance Co. to Loui Hoy at his request and a copy delivered to the Mercantile Mortgage Co. It showed legal title to be in Loui Hoy subject to the liens of the Mercantile Trust Co. trust deed, the first Kepner trust deed, and the Jack mortgage. It thus appears that the Mercantile Mortgage Co. had both actual and constructive notice of the Jack mortgage. On June 1, 1928, Loui Hoy and Wong Shee executed a note in the sum of $51,500 and a trust deed, hereafter referred to as the Mercantile Mortgage Co. trust deed, to secure said note in favor of the Mercantile Mortgage Co. as beneficiary. On June 14, 1928, the Mercantile Mortgage Co. forwarded to the City Title Insurance Co. this trust deed, its check for $38,470, and a statement to be executed and returned when said trust deed constituted a first lien and directed that all encumbrances be paid so that the Mercantile Mortgage Co. trust deed should constitute a first lien. The sum of $38,301.88 then due on the Mercantile Trust Co. trust deed was paid and a reconveyance was executed on June 20, 1928, recorded October 5, 1928. The Mercantile Mortgage Co. trust deed was recorded June 16, 1928. Of the sum loaned by the Mercantile Mortgage Co., $12,000 was used in building an additional story on the building located on the property here involved. As a part of the same transaction, Kepner had agreed to reconvey his first trust deed and to accept a new trust deed, hereafter referred to as the second Kepner trust deed, securing the sum of $15,000. A new note and the second Kepner trust deed were executed June 12, 1928, and recorded June 16, 1928. The reconveyance of the first Kepner trust deed was recorded June 16, 1928. As a further part of said transaction, Loui Hoy caused to be delivered to the City Title Insurance Co. what purported to be a release of the Jack mortgage, and it was recorded on June 16, 1928. It was a forgery. However this fact was not discovered at the time, and on the faith of the release the Mercantile Mortgage Co. trust deed was recorded.

The trial court found, and the evidence so indicates, that the Mercantile Mortgage Co. trust deed was not a renewal of the Mercantile Trust Co. trust deed, and that the second Kepner trust deed was not a renewal of the first Kepner trust deed.

Subsequent to the events above related, The Shoong Investment Co. loaned $20,000 to Loui Hoy on June 18, 1930, and a trust deed as security therefor was executed on the same day. Contemporaneous with said loan, the balance due upon the note secured by the second Kepner trust deed was paid on June 21, 1930, and a reconveyance of the interest held under said trust deed was executed June 20, 1930, and recorded June 21, 1930. A further loan of $10,000 was made to Loui Hoy by The Shoong Investment Co., and a note and trust deed on the property executed. On May 2, 1932, Loui Hoy executed an assignment of the rents to be received from the property to Madison & Burke, as trustees for The Shoong Investment Co., to be held as further security for the indebtedness secured by the Mercantile Mortgage Co. trust deed. The Shoong Investment Co. purchased the note payable to the Mercantile Mortgage Co. and said note and the trust deed securing it were assigned to The Shoong Investment Co. on April 29, 1932, recorded May 2, 1932.

On July 14, 1932, The Shoong Investment Co. filed a notice of default and election to sell under the Mercantile Mortgage Co. trust deed. Thereafter, on October 7, 1932, Louie Jack instituted the present action to foreclose his mortgage. Thereupon, the defendants took the deposition of Louie Jack, and at said time he exhibited his note and mortgage, and his testimony showed that at the time the alleged release of his mortgage purported to be executed, he was in China. Nevertheless, The Shoong Investment Co. proceeded to cause the property to be sold under the Mercantile Mortgage Co. trust deed, and, on February 20, 1933, it purchased the property at public sale. The purchase price at said sale was paid by The Shoong Investment Co. by endorsement of payment on the note, and a deed of the premises was executed and delivered by the trustee under the Mercantile Mortgage Co. trust deed to The Shoong Investment Co. on February 20, 1933, recorded February 23, 1933.

The answer of the defendants, other than the defendant Wong Shee, alleges as a "second" defense the existence of the Mercantile Trust Co. trust deed; the existence of the Mercantile Mortgage Co. trust deed; that the latter was given as a renewal of the former; that the Mercantile Mortgage Co. trust deed was assigned to The Shoong Investment Co.; that the property was sold under the Mercantile Mortgage Co. trust deed and purchased by The Shoong Investment Co., and a deed executed to The Shoong Investment Co.; and that said defendant "is now the owner and holder of said premises and of all the right, title, claim, and interest therein, and thereto which was owned by said Loui Hoy and Wong Shee, his wife, on the 10th day of November, 1926". As a separate defense, they plead the two Kepner trust deeds and allege that the latter was a renewal of the former, and they allege that The Shoong Investment Co. trust deed of 1930 is a renewal of the second Kepner trust deed, and that no part of the debt has been paid. They further allege as defenses laches and estoppel, the release of the mortgage, and lack of consideration. As another defense, they allege the assignment of the rents to Madison & Burke. They incorporate the allegations of the "second" defense and allege ownership in fee simple. The prayer is that the plaintiff take nothing by virtue of his complaint; that it be adjudged that plaintiff's interest is subordinate to the claim of defendants; and that The Shoong Investment Co. be declared owner of said premises and its title be quieted against the plaintiff. They conclude with a prayer for general relief.

[2] The chief contention of appellants is that under the facts as found, they were entitled to be subrogated to the rights of the Mercantile Trust Co. under its first trust deed and the rights of Kepner under his first trust deed. To this end, they urge that the findings do not support the judgment. It is their position that the Mercantile Mortgage Co. was entitled to be subrogated to the rights of the Mercantile Trust Co. under its first deed of trust, since the Mercantile Mortgage Co. furnished the money with which the Mercantile Trust Co. trust deed was paid, upon the faith of obtaining a first lien. They argue similarly that, since Kepner released his first trust deed upon agreement that his second trust deed would be subject only to the Mercantile Mortgage Co. trust deed, he was entitled to be subrogated to his rights under the first trust deed. The second Kepner trust deed has been fully paid and all interest granted thereunder reconveyed to Loui Hoy and Wong Shee. While it is true that the reconveyance of the second Kepner trust deed was contemporaneous with a loan of $20,000 by The Shoong Investment Co. to Loui Hoy and Wong Shee and the reconveyance was recorded on the same day as the trust deed given to secure the loan just mentioned, the trial court

found that the second Kepner trust deed was not renewed, but was paid and discharged. All that appears is that the second Kepner trust deed was reconveyed on the same day The Shoong Investment Co.'s trust deed was recorded. There is no basis for appellants' contention that The Shoong Investment Co. became the holder of Kepner's rights under his second deed of trust, and there is therefore no basis upon which appellant can assert Kepner's right of subrogation to his position held under the first Kepner trust deed.

[3, 4] However, The Shoong Investment Co. was entitled to assert whatever right of subrogation the Mercantile Mortgage Co. was entitled to assert. It will be recalled that the Mercantile Mortgage Co. advanced $51,500 to Loui Hoy with the express understanding and upon the condition that it should obtain a first lien on the property. It further specified that the sum so loaned should be used in the payment of the outstanding indebtedness secured by the Mercantile Trust Co. trust deed, and this sum was paid. The Mercantile Mortgage Co. was entitled to be subrogated to the rights of the Mercantile Trust Co. since it had advanced the money by which the debt secured by the latter's trust deed had been paid upon the faith of obtaining a first lien and that expectation had been defeated by the intervention of the Jack mortgage. United States B. & L. Ass'n v. Salisbury, 217 Cal. 35, 41, 17 P.2d 140; Federal Land Bank v. Marvin, 228 Ky. 242, 14 S.W.2d 762, 70 A.L.R. 1396. The Shoong Investment Co. was therefore entitled to be subrogated to the rights of the Mercantile Trust Co. under its trust deed of November 10, 1926.

[5-7] Respondent, in support of his judgment, argues that because the Mercantile Mortgage Co. had notice, both constructive from the record, and actual from the report of the City Title Insurance Co. of the existence of the Jack mortgage, they may not be subrogated to the rights of the Mercantile Trust Co. The mere existence of notice of the intervening lien is not of itself sufficient to defeat the right of subrogation. Copp v. Millen, 11 Cal.2d 122, 127, 77 P.2d 1093; Shaffer v. McCloskey, 101 Cal. 576, 580, 36 P. 196. The junior encumbrancer may still be entitled to subrogation to the rights of the senior encumbrancer if for any reason he innocently and without negligence upon his part believed that the intervening lien of which he had notice was no longer an existing lien upon the property. Here the Mercantile Mortgage Co. relied upon what purported to be a release of the Jack mortgage. While it is true that that release was a forgery and therefore had no effect upon the validity of the Jack mortgage, there is nothing to show that at the time it was delivered to the City Title Insurance Co. by the attorney for Loui Hoy any reason existed for the title company to doubt its validity. It was signed in the name of Louie Jack, and was duly acknowledged. While subrogation will not be granted to a junior encumbrancer who negligently fails to learn that there is an existing intervening lien (60 C.J., p. 709, sec. 21), the City Title Insurance Co. was not negligent under the circumstances in failing to require the delivery of the note and mortgage to it.

[8-11] However, the chief claim of respondent is that the appellants never pleaded or proved a right of subrogation and made no request that they be subrogated to the rights of the Mercantile Trust Co. and of Kepner under his first trust deed. Respondent argues that since the appellants elected to stand upon their legal rights under the Mercantile Mortgage Co. trust deed, to cause the property to be sold thereunder, and to assert legal title acquired by virtue of such sale, they have waived their right of subrogation. It is true that under the law as it exists today the right of subrogation is not one which a party may assert by his own action, but is one which may be asserted only in a civil action. Offer v. Superior Court, 194 Cal. 114, 117, 228 P. 11; 23 Cal.Jur., p. 945; 25 R.C.L., p. 1391, sec. 74. And it is further true that a right of subrogation may be waived. 25 R.C.L., p. 1393, sec. 76; 60 C.J., p. 722, sec. 33. Respondent's position is that there is neither allegation nor proof of facts sufficient to justify subrogation because the appellants have not alleged the existence of the Jack mortgage and prayed that, because of their mistake, they be subrogated to the rights of the Mercantile Trust Co. Appellants, on the other hand, contend that they have alleged all the facts, and that under a prayer for general relief they are entitled to subrogation. The essential difficulty with appellants' position is that while they have alleged and proved facts which would have entitled them to subrogation, they have also alleged and proved facts which show that they have

waived their right of subrogation. The cross-complaint, after alleging the execution of the various mortgages and trust deeds, alleges that Loui Hoy and Wong Shee were in default on the Mercantile Mortgage Co. trust deed and that The Shoong Investment Co. caused the trustee under said deed of trust to sell the property under the provisions of that trust deed; and that at such sale The Shoong Investment Co. purchased the property and paid the purchase price by endorsing payment on the note secured by the trust deed. Appellants then claim title in fee simple as it stood in the name of Loui Hoy prior to the execution of the Mercantile Trust Co. trust deed. These facts were proved as alleged. Appellants' position was, therefore, that the Mercantile Mortgage Co. trust deed stood in the same position as the Mercantile Trust Co. deed, a position that it could never have occupied even under a proper decree of subrogation, because under such a decree the Mercantile Trust Co. trust deed would have been revived and not the later encumbrance substituted for it. By claim of title acquired at the sale under the Mercantile Mortgage Co. trust deed, the appellants have taken a position antagonistic to and the very opposite of subrogation. They have therefore waived any right of subrogation that they might have had. Such conduct on the part of appellants has operated to the prejudice of respondent because, under a proper decree of subrogation, respondent could have protected his lien by payment of the balance due upon the Mercantile Trust Co. trust deed. It is axiomatic that under a right of subrogation, the junior encumbrancer is entitled to occupy only the position of the senior encumbrancer and no better position. 25 R.C.L., p. 1377, sec. 60. By sale under the Mercantile Mortgage Co. trust deed, the appellants have attempted to force the respondent to pay the sum due on that trust deed if he desired to protect his rights, which sum is far in excess of that due under the Mercantile Trust Co. trust deed at the time of its satisfaction and reconveyance. We conclude, therefore, that appellants have waived whatever right of subrogation they might have had under the Mercantile Mortgage Co. trust deed.

[12] Appellants further claim that even though they are not entitled to be subrogated to the rights of the Mercantile Trust Co., the assignment of rents to Madison & Burke is still a valid and subsisting lien, and the trial court erred in concluding otherwise. The record shows that the assignment of rents was for the purpose of securing the same indebtedness as that evidenced by the note secured by the Mercantile Mortgage Co. trust deed. It further shows that said indebtedness has been paid. Since the principal debt for which the assignment was given as security has been paid, the assignment ceased to be a lien upon the property.

[13-16] It is objected that the claim presented is fatally defective in that the plaintiff failed to attach thereto a copy of the note or to refer to the record of the mortgage. Prob.Code, sec. 706. It will suffice to note that the defendant administratrix admits, by reason of her failure to so deny, that the claim was duly presented. Code Civ.Proc. § 462. Appellants complain that there is no substantial evidence to support the finding of the trial court that at the time of the presentation of the claim the plaintiff also presented the original note and mortgage to the administratrix. However, there is testimony which, if believed, amply supports the finding, and it is not within our province to determine the credibility of the witness. The presentation of the original note and mortgage to the administratrix at the time the claim was presented to her was sufficient to cure any defect of the claim arising from the failure to attach a copy of the note and to refer to the record of the mortgage. Raggio v. Palmtag, 155 Cal. 797, 807, 103 P. 312; 11A Cal.Jur., p. 747, sec. 528.

[17] By way of answer, appellants pleaded, in haec verba, the forged release of the Louie Jack mortgage. Affidavits denying the execution of said release were filed after the elapse of more than ten days from the receipt of appellants' answer, but within the time extended by stipulation to "appear, plead, or make such motion as he shall be advised to the answer and cross-complaint". Appellants moved to strike said affidavit from the files upon the ground that they were not filed within the time allowed by section 448 of the Code of Civil Procedure. Said motion was properly denied as the affidavits were filed within the period of time as extended by stipulation. Code Civ.Proc. § 1054.

[18] The plaintiff, Louie Jack, was permitted to testify, over the objection of

the appellants, to certain matters of fact occurring before the death of Loui Hoy. The appellants contend that, by virtue of section 1880, subdivision 3, Code of Civil Procedure, Louie Jack could not testify concerning "any matter or fact occurring before the death" of Loui Hoy, and that in the absence of such testimony, there was no evidence of any consideration for the note or of any indebtedness. It is sufficient to note that appellants offered no evidence which would prove that the note lacked consideration and no evidence that there was no indebtedness. The note itself was presumptive evidence of consideration. Civ.Code, sec. 1614; Code Civ. Proc. sec. 1963, subd. 21 and subd. 39. The production of the note by the respondent Louie Jack, itself gave rise to a presumption that the indebtedness evidenced thereby has not been paid. Levey v. Henderson, 177 Cal. 21, 23, 169 P. 673; Light v. Stevens, 159 Cal. 288, 292, 113 P. 659. In the light of these circumstances it is apparent that the admission of the testimony of Louie Jack was not prejudicial. The presumptions, alone, in the absence of contradictory evidence, were sufficient to support the findings.

[19-22] Appellants further contend that the real property upon which the mortgage of the respondent was a lien was the community property of Loui Hoy and his wife Wong Shee and that, since there is no finding that the mortgage was signed by Wong Shee, the wife, the mortgage was void. The property in question was acquired by conveyance from Joe Shoong and Rose Shoong, his wife, to Loui Hoy, dated September 18, 1924, and the right of Wong Shee to avoid the mortgage is to be determined by the provisions of section 172a of the Civil Code as it read on that date. Stats.1917, p. 829. It is strenuously argued by the appellants that the evidence establishes the fact that Wong Shee and Loui Hoy were validly married in China prior to the time of the conveyance of the property to Loui Hoy. Respondent is equally urgent in pressing the position that Loui Hoy had living in China a wife, Lewu Shee, at the time of his marriage to Wong Shee, and therefore the latter marriage will not be recognized as valid by the courts of this state. We need not decide this question, nor the questions raised by the respondent concerning the applicability of the Alien Land Law, St.1921, p. lxxxiii. It is well established that the husband has the management and control of the community real property. The right conferred upon the wife under section 172a of the Civil Code is merely the right to avoid the conveyance. The conveyance is not void but is merely voidable, and will be treated as valid until avoided by the wife. Trimble v. Trimble, 219 Cal. 340, 344, 26 P.2d 477. Moreover, the right to avoid the mortgage is personal to the wife, and she alone may assert it. Italian American Bank v. Canepa, 52 Cal. App. 619, 621, 199 P. 55; Schelling v. Thomas, 96 Cal.App. 682, 687, 274 P. 755; Spreckels v. Spreckels, 116 Cal. 339, 350, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170 (Concurring opinion of Beatty, C. J.) Spreckels v. Spreckels, 172 Cal. 775, 784, 158 P. 537; Dargie v. Patterson, 176 Cal. 714, 717, 169 P. 360; Goodrich v. Turney, 44 Cal.App. 516, 519, 186 P. 806; Rice v. McCarthy, 73 Cal.App. 655, 664, 239 P. 56. Wong Shee, the wife, was a party defendant in this action both individually and as administratrix of the Estate of Loui Hoy; however, she has not appealed from the judgment of the trial court. Since she was the only person who had the right to avoid the mortgage given to the respondent, the error, if any, affected Wong Shee alone, and appellants cannot complain. 2 Cal.Jur., p. 841.

For the reasons above stated the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

33 Cal.App.2d 554

## In re McCONKEY'S ESTATE.

## LONDON v. McCONKEY.

Civ. 2274.

District Court of Appeal, Fourth District, California.

June 28, 1939.

**1. Appeal and error ⇨989**

In determining sufficiency of evidence to support finding, evidence tending to support finding was considered and other evidence conflicting with it was disregarded.

**2. Deeds ⇨56(3)**

A grantor must place deeds in hands of third party absolutely and without power to control or recall them in order to constitute a valid delivery to grantee.

**3. Deeds ⇨208(1)**

Evidence sustained finding that deeds executed by deceased grantor had not been validly delivered.

**4. Deeds ⇨208(3)**

Generally, possession of deed by grantee is prima facie evidence of its delivery.

**5. Deeds ⇨196(3)**

In case involving purported gift inter vivos based on alleged consideration of love and affection, where grantee is child having control and direction of aged grantor, a strong presumption of confidential relation arises placing on grantee burden of showing fairness in dealing and full understanding on part of grantor, and in absence of such showing conveyance is presumed to have been obtained by undue influence and to be void.

**6. Appeal and error ⇨994(3), 1012(1)**

The credibility of a witness and weight to be given his testimony are questions directed to trier of facts.

**7. Evidence ⇨588**

Under proper circumstances trier of facts may reject all or any part of testimony of any witness if trier of facts believes such testimony to be untrue.

**8. Deeds ⇨211(1, 3)**

Where, after father had executed will leaving property to son and daughter in equal shares, son caused to be recorded two conveyances, while father was in deplorable condition physically and mentally, conveying to son most valuable realty owned by father, and the son paid nothing for property and was not on good terms with his sister, evidence justified trial court's conclusion that son failed to meet burden of showing fairness of his dealings and that his father fully understood the effect of handing deeds to son.

**9. Deeds ⇨76**

Where son claiming under deed from deceased father failed to meet burden of showing fairness of his dealings and that father fully understood effect of handing deeds to son, manual tradition of deeds was not an effective delivery and the transaction was void.

**10. Deeds ⇨54**

Where there was no valid delivery of deeds, no title passed to grantee regardless of how he gained possession of deeds.

**11. Deeds ⇨68(1½)**

Where deed is attacked on ground of grantor's mental incompetency, the mental incompetency must go to the point at issue, namely, incompetency to understand nature and effect of delivery of deed and to form an intention to pass title to grantee by the act of handing the instruments to him.

**12. Deeds ⇨68(1½)**

A person who is mentally incompetent and is of unsound mind, but who is not insane, may, under proper circumstances, transfer his property.

**13. Deeds ⇨68(1½)**

Mere finding of mental incompetency and unsoundness of mind of grantor was incomplete and would not support a judgment of invalidity of deed.

---

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Proceedings in the matter of the estate of Walter D. McConkey, also known as W. D. McConkey, W. McConkey, and Walter J. McConkey, deceased, wherein Dorothy McConkey London filed a petition against Norman McConkey to compel him to account for certain property and to account to the estate for rents, issues, and profits thereof. From an adverse judgment, Norman McConkey appeals.

Affirmed.

Hales & Hales, of Redlands, for appellant.

Jerome Lyman Richardson, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from a judgment decreeing that six lots on Orange street in the city of Redlands were the property of Walter D. McConkey (also known as W. D. McConkey, W. McConkey and Walter J. McConkey) at the time of his death and are part of his estate; that deeds purporting to convey those lots to Norman McConkey (Walter Norman McConkey) were void; requiring Norman McConkey to account to the estate for the rents, issues and profits of the property.

Walter D. McConkey died testate on January 19, 1936, at the age of almost eighty-two years. He left surviving him, as heirs at law and devisees, Norman McConkey, his son, and Dorothy McConkey London, his daughter, who were appointed executor and executrix of his last will and testament. He left his property in equal shares to Norman and Dorothy.

Norman assumed active charge of the administration of the estate. He returned an inventory and appraisement which did not include the Orange street property. Dorothy filed a petition in which she alleged Norman was wrongfully claiming title to that property under two deeds from their father which were void because of lack of delivery to him and because of the mental incompetency and unsoundness of mind of their father at the time of the purported delivery; that the property belonged, subject to administration, to Norman and herself in equal shares; that Norman had wrongfully appropriated the rents, issues and profits of the property to himself under claim that they belonged to him and had refused to account for any of them. An order to show cause was issued and served. In so far as the record shows no answer was filed to this petition.

The trial court found to be true all facts alleged in the petition and rendered judgment accordingly.

As grounds for reversal of the judgment Norman urges that several of the findings of fact are not supported by the evidence and are contrary to all of the evidence. These questioned findings may be summarized as follows: (1) That Walter D. McConkey never delivered the two deeds, or either of them, to a third person in escrow to be delivered to Norman. (2) That Walter D. McConkey never delivered either of the two deeds to Norman and never intended to divest himself of title nor to invest Norman with title to any of the property described in the deeds. (3) That Norman, surreptitiously and without the knowledge or consent of his father obtained possession of the two deeds and recorded them. (4) That Walter D. McConkey, from December 26, 1933, until his death, was mentally incompetent and of unsound mind.

[1] As the sufficiency of the evidence to support these findings is challenged, we will summarize such of the evidence as supports them and will disregard other evidence conflicting with it.

Walter D. McConkey retired from the grocery business in about 1921. Norman bought the business shortly thereafter. In 1922 Walter D. McConkey considered making arrangements for the final disposition of his property and consulted his attorney. He requested information as to how he could make disposition of his property without incurring probate costs. He was advised that he could have the property deeded in joint tenancy with right of survivorship to himself and the person to whom he desired it to go; that he could convey the property to such person, reserving a life estate in himself; that he could sign and acknowledge deeds and place them in escrow with a third person to be delivered at his death.

On March 6, 1922, Walter D. McConkey signed and acknowledged a grant deed conveying four of the six lots on Orange street to Walter N. McConkey. On October 10, 1922, he signed and acknowledged a grant deed conveying the other two lots on Orange street to Walter Norman McConkey. The records of the notary public who acknowledged these two deeds, show that on October 10, 1922, Walter D. McConkey acknowledged a third deed conveying property to Dorothy London. The notarial record fails to contain any description of the property described in this deed. The deed itself disappeared.

A few years after the preparation of these deeds, probably around the year 1928, Walter D. McConkey delivered a sealed envelope to T. J. Hammett, a friend, who returned this envelope unopened to Walter D. McConkey in the latter part of 1934. If any instructions were given Mr. Hammett he did not remember them. The evidence did not disclose the contents of this envelope.

The health of Walter D. McConkey began to fail in 1929. Shortly thereafter he turned over all his business affairs to Norman. He spent some time in the Loma Linda Sanitarium in 1930. He was again admitted to that institution on September 7, 1932. The records of the hospital show that he was then suffering from senile dementia. On December 26, 1933, he suffered a cerebral hemorrhage which affected his mind and body and from which he never recovered. He was confined to his bed until about June, 1934. For several months after that date he made a slow physical, if not mental, recovery until about August 1, 1935, when he was moved to a rest home in Loma Linda. From that date until his death he was confined to his bed and only sat up in it twice.

His condition from December 26, 1933, to about June, 1934, is described in considerable detail by several witnesses. His right side was completely paralyzed. He was physically helpless. He had no control over the functions of his body. The paralysis affected the muscles controlling his speech so that he could only mumble words. Only those who were frequently with him could interpret what he tried to say, partly from the sounds he uttered and partly through reading his lips. He thought that his wife who had been dead eighteen years, was alive and he wanted to see her. He thought he was still in the grocery business (from which he had retired in 1921) and that he had been in his store. A permanent characteristic of these delusions was that he had seen his wife about two weeks before, and that he had been to the grocery store about two weeks before each time he expressed either of these ideas. He had other delusions. When attempting to express himself he was unable to keep to any subject. His mind would wander.

Between June 1, 1934, and August 1, 1935, his physical condition improved to such a degree that his nurse could get him out of bed and into a chair. This improvement continued until he could take a few steps with his attendant always present to keep him from falling. His ability to enunciate also improved but his mind remained "cloudy" or "foggy", as one witness described it. It would stay on one subject but a very short time. He insisted on subscribing for a daily newspaper but often had it upside down when attempting to read it. His delusions continued.

The nurse who attended him from December 26, 1933, to August 1, 1935, thought him mentally unsound and mentally incompetent to transact any business. The physician who attended him over the same period pronounced him of unsound mind. The superintendent of the rest home who cared for him from August 1, 1935, to January 19, 1936, expressed the following opinion: "Well, I took Mr. McConkey as a —— just practically a physical and mental wreck. I mean by that that he was a bed patient, and he had lost all his power of control, both physically and mentally."

The sole evidence of the manual delivery of the two deeds by Walter D. McConkey to his son Norman is found in the testimony of the latter. Norman was called by Dorothy as the first witness for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. He testified that his father was living in a house in an orange grove belonging to Norman; that he called on his father in March or April, 1934, and found him sitting in a rocking chair in the living room; that he had a conversation with him; that as he was leaving his father handed him a bundle of newspaper clippings, principally grocery advertisements, which were tied together with a string. He described this happening as follows: "* * * When I got ready to leave he had these papers and the deeds and the circulars wrapped there and he says, 'Take these along.' So I noticed these deeds on there and I asked him, 'What are these,' and he says, 'You take those; those belong to you,' and if I remember right, that was all that was said about them, and I took all of them along, and I took them down to the store and put them in the safe there and I left them there—it must have been a year—ten months anyway, so one day my wife was cleaning out the old insurance policies, and she came across these deeds and asked me if they were any good, and I told her, 'Leave them out there, and I will take them down to Mr. Hales and see what he says about them,' so I took them down there—that must have been a year later."

Norman also testified that his father was only bedridden about two weeks following December 26, 1933; that on some days he was quite bright and rational and could walk by himself.

Following this appearance of Norman on the witness stand, various witnesses for Dorothy testified to the physical and mental condition of Walter D. McConkey which we have already described. It was established that he did not leave his bed until at least June 1, 1934. Mr. Hammett testified that he did not return the envelope which Walter D. McConkey had given him until after April, 1934. It should be remembered that Norman maintained in the trial court, and is maintaining here, that this envelope contained the two deeds which he testified his father delivered to him in March or April, 1934.

After these witnesses had testified, Norman again took the witness stand in his own behalf. He then contradicted his former evidence in several important particulars. He changed the date of the purported delivery of the deeds to an indefinite time after April, 1934, probably in July or August of that year. He also testified that when the deeds were delivered to him they were in a large envelope about twelve inches long. The trial judge may have concluded this was done in an effort to remove the conflict with the testimony of disinterested witnesses who had followed his first appearance on the stand.

Norman testified to many acts of dominion and control by his father over the Orange street property. He also testified to his own conduct, which recognized his father's ownership of the property. He collected the rents and accounted to his father for them. He permitted his father to use the house in the orange grove as a residence in exchange for his occupancy of a store on one of the Orange street lots. He estimated the rental value of each property at thirty dollars a month so that the one balanced the other and no money was exchanged between them. This arrangement lasted at least from December 26, 1933, to August 1, 1935. His father paid the taxes on the property up to 1933. Norman, out of his father's money which he controlled, paid the taxes for 1933, 1934 and the first instalment for 1936. Who paid the taxes in 1935 does not appear, but Norman made no claim to having paid them out of his own funds.

In 1933 a fire insurance policy for three years was written on the buildings on the Orange street property with the loss payable to W. McConkey. No change was made in the loss payable clause of this policy. In December, 1936, a lost policy certificate was issued to take the place of a lost fire insurance policy issued on the Orange street property on September 28, 1936, for three years. The affidavit of the loss of the policy was made by Norman. In both the original policy, and the lost policy certificate, the loss, if any, was made payable to the estate of W. McConkey, deceased.

[2] Appellant's argument that a delivery of the two deeds in question here was effected by their being placed in the hands of J. T. Hammett by Walter D. McConkey, needs scant consideration. It is essential to the validity of such delivery that the grantor place the instruments in the hands of a third party absolutely and without the power to control or recall them. Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am. St.Rep. 131. No such delivery to Hammett was established in this case. The return of the envelope by Hammett to Walter D. McConkey would negative the idea of any such delivery. In fact there is no evidence that these deeds were in the envelope which was delivered to Hammett. That leaves a further gap in the evidence which has not been bridged.

[3] Appellant earnestly argues that the finding that the deeds were never delivered by Walter D. McConkey to Norman is not only unsupported by the evidence but is contrary to all of the evidence in the case. This argument is based on the testimony of Norman which, it is claimed, established the fact of a valid delivery that was not and could not be disputed as Norman was the only living witness to the purported delivery of the deeds. This argument is supported by the rule laid down in Stewart v. Silva, 192 Cal. 405, 221 P. 191, 192, as follows:

"Even if we assume that the trial court believed and intended to find as a fact that the attorney, his clerk, and stenographer, and the defendant deliberately testified falsely as to the delivery of the deed, we still have the presumption of delivery arising from the fact that the grantee in the deed actually had the possession of the deed and produced it in court. This alone constituted prima facie evidence of delivery. Ward v. Dougherty, 75 Cal. 240, 242, 17 P. 193, 7 Am.St.Rep. 151. It was there said: 'Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is prima facie evidence of its delivery.

"'The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of nondelivery should prevail against the presumption. (Devlin on Deeds, § 294.)' "

[4, 5] While the general rule laid down in the last cited case cannot be questioned, we believe there is a special rule which is applicable to the facts of this case and which must be controlling here. It is stated in Campbell v. Genshlea, 180 Cal. 213, at page 224, 180 P. 336, 341, as follows: "It is to be remembered that in a case involving a purported gift inter vivos, based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289. In the absence of such showing, the conveyance is presumed to have been obtained by undue influence and to be void. Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561; Odell v. Moss, 130 Cal. 352, 62 P. 555; Ross v. Conway, 92 Cal. 632, 28 P. 785."

[6, 7] Further, it is thoroughly settled in California that the credibility of a witness and the weight to be given to his testimony are questions directed to the trial judge and that under proper circumstances he may reject all or any part of the testimony of any witness if he believes such testimony to be untrue. In the instant case Norman McConkey rather thoroughly impeached himself in his two appearances on the witness stand. Much of his evidence was flatly contradicted by disinterested witnesses. He had charge of all his father's affairs after 1932 and was his trusted agent. His father had executed a will in 1931 leaving his property to his two children in equal shares. In March, 1935, while his father was in a deplorable condition, physically and mentally, he caused to be recorded two deeds which conveyed to him the most valuable real estate owned by his father. He paid nothing for this property. He was not on good terms with his sister Dorothy. He claimed delivery of these deeds to him by his father under circumstances which could not have occurred, according to the evidence of entirely disinterested witnesses, while his father was of unsound mind and probably without sufficient mentality to comprehend the nature of his act. Also, there is strong circumstantial evidence contradicting the fact of delivery of the deeds and the passing of title to the property from Walter D. McConkey to Norman.

[8, 9] Under these circumstances the trial court was fully justified in concluding that Norman failed to meet the burden of showing the fairness of his dealings and that his father fully understood the effect of handing the deeds to Norman. Under such circumstances and in the absence of such showing on the part of Norman, the manual tradition of the deeds meant nothing and the transaction was void. No title passed to Norman.

[10] Appellant's attack on the finding that he obtained the two deeds surreptitiously is probably well founded. However, this fact cannot affect our decision. If there was no valid delivery of the deeds, no title passed to Norman, regardless of how he gained possession of them.

[11-13] Appellant urges that the finding that Walter D. McConkey, after December 26, 1933, "was mentally incompetent and of unsound mind" fails to support the judgment. We think this position sound. The mental incompetency and unsoundness of mind must go to the point at issue, namely, a mental incompetency to understand the nature and effect of the act in question, the delivery of the deeds, and to form an intention to pass title to the grantee by the act of handing the instruments to him. A person who is mentally incompetent and is of unsound mind, but who is not insane, may under proper circumstances, make a will or transfer his property. In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794; Hemenway v. Abbott, 8 Cal.App. 450, 97 P. 190; San Francisco Credit Clearing-House v. MacDonald, 18 Cal.App. 212, 122 P. 964.

The fact that the finding of the mental incompetency and unsoundness of mind of Walter D. McConkey is incomplete cannot affect our decision here. As the finding that there was no valid delivery of the deeds to Norman is supported by the evidence and supports the judgment, the finding we are considering becomes immaterial. No title to real property can pass by a deed that has not been delivered.

Judgment affirmed.

I concur: BARNARD, P. J.

## BARNETT et al. v. LA MESA POST NO. 282, AMERICAN LEGION, DEPARTMENT OF CALIFORNIA, et al.*

Civ. 2095.

District Court of Appeal, Fourth District, California.

June 12, 1939.

Hearing Granted Aug. 10, 1939.

**1. Animals** 🔑**67, 70**

To enforce liability of owner of domestic animal, alleged to be vicious, as such owner knew, for injuries inflicted thereby on another, it must appear that animal was vicious and that owner had actual or imputed knowledge of such fact.

**2. Animals** 🔑**74(5)**

In action for injuries alleged to have been caused by defendants' negligent performance of duty in care and handling of vicious domestic animal kept, harbored or owned by them, proof of such negligence is essential to recovery.

**3. Animals** 🔑**70**

Knowledge by or notice to servant of viciousness of master's animal, respecting which servant is charged with no duty, is not notice to master, but servant's knowledge of vicious or ferocious disposition of animal intrusted to him by master is latter's knowledge, sufficient to render him liable for injuries caused by animal while in servant's custody or control.

**4. Animals** 🔑**67**

The mere fact that horse became unmanageable and injured certain persons is insufficient to prove it vicious or generally unsafe.

**5. Animals** 🔑**74(5)**

Detailed evidence of horse's behavior under extraordinary circumstances, as during formation of pet parade in which it was entered, is not sufficient proof of its viciousness to warrant recovery of damages from parade sponsor and owner and rider of horse for injuries caused thereby.

**6. Animals** 🔑**70**

One guilty of negligence, proximately causing injury to another, in handling domestic animal owned by former, is liable to injured person for damages, regardless of such owner's knowledge of animal's viciousness.

**7. Animals** 🔑**74(8)**

In action for injuries caused by horse, evidence *held* insufficient to take to jury question of horse's viciousness.

**8. Animals** 🔑**74(3)**

In action for injuries caused by horse, mere occurrence of accident is not proof of defendants' negligence in handling horse.

**9. Animals** 🔑**74(3)**

In action for injuries caused by horse, plaintiffs, alleging in first count of complaint that injuries were caused by defendant's negligence, assumed burden of proving that they were caused, not by unavoidable accident or any one's fault, but by some negligence of defendants.

**10. Animals** 🔑**74(8)**

In action for injuries caused by horse, evidence *held* to show that ordinarily reasonably prudent person would not have foreseen and anticipated danger to plaintiffs from horse, so as to preclude submission to jury of question of defendants' lack of care and negligent performance of duty in handling horse.

**11. Appeal and error** 🔑**927(3)**

On appeal from judgment of nonsuit in action for injuries caused by horse, it must be presumed, in absence of contrary evidence, that rider of horse at time of accident was fit and proper person to be entrusted with care thereof.

**12. Animals** 🔑**67**

An organization, providing safe place from which persons injured by horse entered in pet parade sponsored by such organization might observe parade, were not bound to manage formation thereof on school ground so that no harm could possibly come to anyone coming thereon uninvited, as such persons did.

---

*For subsequent opinion see 99 P.2d 650.

**13. Animals ⇨67**

Persons not participating in pet parade, sponsored by organization inviting participants therein to assemble on school ground for formation of parade, were not "invitees" thereon when injured during such formation by horse entered in parade. School Code, §§ 6.750–6.770.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

**14. Negligence ⇨134(1)**

In negligence action, absence of proof of either defendant's duty to protect plaintiff from injury, failure to discharge such duty, or resulting injury is fatal to recovery by plaintiff.

**15. Negligence ⇨134(3)**

In action for injuries sustained by plaintiff on defendant's premises, evidence failing to sustain averments of complaint and showing that plaintiff entered premises as mere licensee without invitation, express or implied, does not establish right of action.

**16. Trial ⇨45(3)**

In action against American Legion post for injuries caused by horse on school ground, where pet parade sponsored by defendant was forming, testimony that witness told defendant's agent that such horse should be removed from parade was properly excluded, where offer of proof did not indicate that proffered testimony would show notice to defendant that horse was vicious or obstreperous.

**17. Appeal and error ⇨1056(1)**

In action for injuries caused by horse on school ground, whereon pet parade sponsored by defendant was forming, exclusion of testimony that witness told defendant's agent that horse should be removed from parade was not error prejudicial to defendant, in absence of evidence sufficient to justify finding that horse was vicious and obstreperous animal before accident.

---

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Marion R. Barnett and others against La Mesa Post No. 282, American Legion, Department of California, and others, for personal injuries caused by a horse entered in a pet parade sponsored by named defendant. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Fenton Garfield, August J. O'Connor, and George J. Hider, all of Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, and W. H. Jennings, of La Mesa, for respondents.

GRIFFIN, Justice.

The respondent La Mesa Post No. 282, American Legion, Department of California, a corporation, hereinafter designated "Legion Post", as a part of certain festivities in the city of La Mesa, in celebration of the burning of certain Mattoon District and other bonds, sponsored a pet parade and invited the general public to witness the display. The appellants, who were not to be participants in the parade, appeared upon the school grounds where the parade was to be formed. Mrs. Barnett accounts for her presence on the school grounds in this manner: that her sister, Mrs. Culver, purchased some red caps; that she, with her daughter, accompanied her sister in delivering them to her sister's children who were to participate in the parade. They remained on the school grounds thereafter for a period of 20 to 30 minutes before the time of the injury. While they were on the grounds and before the time the parade started, the appellants Marion R. Barnett and Sally Ann Barnett were struck by a palomino horse which was owned by the respondent Fred Slocum and was being ridden by the respondent Herbert Slocum. The palomino horse had been registered by a Mr. Levy, a subcommitteeman of the Legion Post, as an entrant in the parade about 20 to 40 minutes before the accident hereinafter referred to occurred. As a result of the accident the appellant Marion R. Barnett sustained various injuries and the appellant Sally Ann Barnett was slightly bruised. Appellants thereafter brought this action to recover damages for their injuries, naming as the defendants the Legion Post, the owner, and the rider of the horse. Their complaint contained two counts. The first alleged that the injuries were caused by the negligence of the respondents, and the second alleged that the horse which caused the injuries was a vicious, obstreperous animal. In each count it was alleged that appellants were invitees of the defendants at the time of the accident. The respondents denied the allegations and set up the defense of contributory negligence. Respondents separately moved for nonsuit. The trial court granted the motions.

It follows that the question primarily presented by this appeal is: Did the appellants present to the trial court any evidence sufficient to justify either (1) a finding that the palomino horse was known by respondents to be an "obstreperous and vicious" animal; or (2) a finding that the respondents were negligent in the course of conduct adopted by them in the handling of the animal, or in preparing for the parade, and that this negligence proximately caused the injuries received by appellants?

The questions presented also involve the status of appellants, under the undisputed evidence, as to their presence on the school grounds, to determine the degree of care and duty owed to appellants by respondents. Complaint is also made respecting the ruling of the trial court excluding certain proffered evidence.

[1-5] Where the plaintiff alleges in the complaint two separate causes of action for negligence, one for injury caused by a vicious domestic animal kept, harbored or owned by the defendants, which defendants knew to be vicious, and the other for injury caused by the negligent performance of duty in the care and handling of such animal, the prevailing rule is this: In order to enforce the liability of the owner or keeper of the vicious domestic animal for injuries inflicted thereby to another person it must appear that the animal was in fact vicious and that the owner had knowledge of its viciousness, either actual or imputed. As to the allegation of injury caused by the negligent performance of duty, proof of such negligence is essential to a recovery. Knowledge by or notice to a servant of the viciousness of the master's animal, with respect to which he is charged with no duty, is not notice to the master, but the knowledge of a servant to whom an animal is intrusted, of its vicious or ferocious disposition, is the knowledge of the master, sufficient to render him liable for injuries caused by such animal while in the custody or control of such servant. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 50 P. 373, 62 Am.St.Rep. 238; Gooding v. Chutes Co., 155 Cal. 620, 102 P. 819, 23 L.R.A.,N.S., 1071, 18 Ann.Cas. 671; Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 P. 645; Ficken v. Jones, 28 Cal. 618; Haneman v. Western Meat Co., 8 Cal.App. 698, 97 P. 695. The mere fact that the animal became unmanageable and injured the appellants, is not sufficient to prove it vicious or generally unsafe (Finney v. Curtis, 78 Cal. 498, 21 P. 120), nor is it sufficient proof of viciousness to detail the behavior of the animal under extraordinary circumstances.

[6] It has likewise been held that when a domestic animal is rightly at the place where the injury occurred, the owner is not liable for injuries unless the viciousness of the animal and knowledge of such fact on the part of the owner are shown. Looney v. Bingham Dairy, 70 Utah 398, 260 P. 855. If, however, the owner is guilty of negligence in handling the animal, he may be liable, regardless of scienter, provided such negligence in handling is the proximate cause of the injury.

[7] In the light of these general rules, let us examine the evidence. The viciousness of the horse as reflected in the record of the evidence may be summarized as follows:

One witness, Ted (a young boy participant), testified that he observed the palomino horse, together with about 20 or 30 other horses, assembled on the school grounds awaiting the formation of the pet parade that was to be exhibited in the city streets. The school grounds were enclosed. While there assembled, he noticed all the horses, over a period of about one-half to three-quarters of an hour. His testimony is as follows:

"Q. Did you notice any of the other horses in the group backing up or switching around? A. No.

"Q. All stood perfectly still, did they, except this one? A. Not perfectly still. Horses usually walk around. This buckskin horse was exceptionally bad. * * *

"Q. Tell the ladies and gentlemen of the jury * * * what you saw about this horse. A. * * * The horse cut up a couple of times before Mrs. Barnett was hurt. * * * I saw this horse go out and make a circle and hit Mrs. Barnett and go around a wagon around here and back of the back-stop into the fence before they could stop him. * * *

"Q. How was he acting before he ran into Mrs. Barnett? A. Several times he acted the same way. * * * He wasn't controllable."

His testimony as to the actual conduct of the horse as distinguished from his opinion of that conduct was exceedingly meager.

The court held in Marks v. Columbia County Lumber Co., 77 Or. 17, 149 P. 1041, that opinion evidence that a horse was not a safe one was inadmissible. The context of the entire testimony shows that even appellants' witness meant only that the horse was more restless than the average, and that he did not mean by his language to indicate that the horse had a mean disposition or was vicious as that term is generally applied to animals.

Another witness (a young boy) related the horse's conduct as follows: That the horse "had been acting up as Ted said" and that when an effort was made to line up the horses for the parade the palomino "would keep bolting out".

Appellants' third witness (another boy 15 years old) said: "Well, that horse among all the rest, why you would notice it because the most of the rest—well, they were fairly quieted down and the owners were not having a hard time with them, but this one, it seemed to be kind of skiddish and didn't seem like it was ever around a crowd like that before, and it was jumping around and it wouldn't stand still and just moving all the time, side-stepping and kind of jumping and cutting up all the time."

The fourth witness (a 14-year-old boy) testified the horse was "acting up", and "side-stepping and plunging until it finally whirled and reared and dashed over to where it injured Mrs. Barnett".

Mrs. Culver testified that the horse "was making a disturbance to the extent that it would draw the attention of the by-standers to the group of horses. Each time this disturbance would occur, I would turn from my children in the wagon and look back to the horses and as near as I can recall it was sufficient to call my attention twice before he finally bolted from the group of horses, leaving them and striking my sister down." Her statement continued:

"Q. What was the horse first doing when you noticed it? A. I am quite a ways from the horse. Whatever he did caused the other horses to move back.

"Q. You didn't see the horse? A. I did after I turned around.

"Q. After you turned around what did you see? A. I don't know what horses do, but this horse was either standing up or putting his feet down somewhere else or backing up or swinging around. I know nothing about horses.

"Q. Did that frighten you? A. Not where I was.

"Q. Did Mrs. Barnett say anything to you about the horse? A. I cannot say that Mrs. Barnett did.

"Q. Did she say to you it was a bad horse or shouldn't be here or something of that kind? A. No, sir."

She also testified that Levy made a statement after the injury that "I should have taken that horse out of the parade."

The only other witness who testified as to the conduct of the horse was the appellant Marion R. Barnett, whose sole statement on the subject was as follows: "I saw the horse before it struck me down. I noticed it rearing and whirling and backing around, causing a great deal of trouble among the other horses, and I saw it then once and again I noticed the disturbance about 10 or 15 minutes before I was struck. We were at a good distance from the horse and I never thought but what we were perfectly safe."

There was no evidence of any character that the horse had ever before misbehaved in any fashion. It must be borne in mind that only those horses classified as "pets" were to participate. The trial judge said, in summarizing the evidence: "I don't believe that the fact that this horse reared and sidestepped and whirled at times in the 20 to 40 minutes before the parade started, without any danger, so far as the evidence shows at least, to any one on account of those preliminary passages, was any notice to anyone that it was a vicious horse. * * * My understanding of the matter is that a horse that will do a little prancing and rearing and whirling around once in a while is the kind of a horse that is desirable for a parade. I never saw a plow horse in a parade in my life. * * * The law doesn't call a horse vicious because he rears and sidesteps. A horse that doesn't do that once in a while isn't a very good riding horse as a matter of fact."

In Haneman v. Western Meat Co., supra (hearing denied in the Supreme Court), the evidence showed two previous kickings by a horse to which was attached the name Kicking Bill. The court held the evidence insufficient to show that the horse was vicious and said [8 Cal.App. 698, 97 P. 696]: "The best trained horse may for the first time kick or run away. To hold the owner of such animal liable it must be shown that such owner failed in some duty to the party injured. In this case it is not shown that the horse was possessed of any characteristic vice, or that the defendant knew of any such vice." And the court cited the old adage that "every dog is entitled to his first bite before he becomes a biting dog".

We see no reason to disturb the holding of the trial court in granting a nonsuit in reference to the first count.

[8-13] As to the second count, it must be remembered that the mere occurrence of the accident is in itself no more proof of negligence on the part of respondents than it is proof that the horse was of a vicious character. Appellants, by the first count of their complaint, assume the burden of proving that the injuries were caused not by an unavoidable accident or by fault of anyone, but rather by reason of some negligence of the respondents. Yet an examination of the entire record shows that there is no evidence which would justify finding respondents guilty of that lack of care and duty required, for it seems clear from all the testimony that an ordinarily reasonably prudent person would not have foreseen and anticipated the danger to appellants from the palomino horse. According to the undisputed testimony of all witnesses, including the appellant Marion R. Barnett and her sister, the horse was from 70 to 90 feet from appellants. An ordinarily reasonably prudent person would believe that there would be no danger to persons that distant from a horse which was simply restless and uneasy, not at home in a crowd, and showed no other signs of danger. Even appellant Marion R. Barnett, after testifying that she saw the horse, said: "We were at a good distance from the horse and I never thought but what we were perfectly safe." In other words, both Marion R. Barnett and Mrs. Culver saw everything the respondents saw. They knew exactly how far they were from the horse and they didn't think they were in any danger. Yet appellants now argue that the Legion officials who, in the very nature of things, could not possibly have seen any more than appellants, saw, or have had any greater knowledge, should from the same facts have determined that appellants were being endangered by the horse. It must be presumed, in the absence of any evidence to the contrary, that the riders of the various horses in general, and Herbert Slocum in particular, were fit and proper persons to be intrusted with the care of the various horses which they rode. In the absence of at least some evidence that they were incompetent, there was clearly no duty imposed upon the Legion Post to provide other and additional horsemen. Appellants were invited only to view the parade from the streets along which it passed and were not invited to come on the school ground prior to the commencement of the parade. Nevertheless, they voluntarily exposed themselves to whatever dangers were attendant upon the formation of the parade. Respondents having provided a safe place from which appellants might observe the parade, were not bound to so manage the formation that no harm could possibly come to anyone who like appellants came uninvited upon the formation ground. The invitation extended by the Legion Post to assemble on the school grounds for the formation of the parade was directed only to participants. Appellants were not participants. Therefore, they were not invitees on the school grounds at that particular time within the meaning of that term. The appellants' complaint alleges that they were invitees. The evidence fails to establish this fact. Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Bush v. Weed Lumber Co., 63 Cal.App. 426, 218 P. 618; Rooney v. Woolworth, 74 Conn. 720, 52 A. 411; sections 6.750–6.770, School Code; Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal.App. 263, 285 P. 889.

[14, 15] It was held in Means v. Southern California R. Co., 144 Cal. 473, 476, 77 P. 1001, 1 Ann.Cas. 206, that in order to sustain a complaint for actionable negligence, the proof must show the duty of defendant to protect the plaintiff from injury, the failure to discharge it, and the resulting injury. The absence of proof of any of these is fatal to a recovery. Where the evidence failed to sustain the averments of the complaint, and showed that the plaintiff entered the premises as a mere licensee without invitation, express or implied, to whom the defendant owed no duty to keep the premises in a safe condition, but merely to inflict upon him no wanton or wilful injury, which injury was not shown, no right of action is sustained by the evidence. See, also, Kirkpatrick v. Daminakes, 15 Cal.App. 2d 446, 59 P.2d 556. We feel that the trial court was also justified in holding that the evidence was not sufficient to establish the lack of duty and care required.

[16] Appellants also urge that the judgment of nonsuit should be reversed because of alleged error in excluding the proffered testimony of one Mrs. Reid to the effect

that she had told Mr. Levy that the palomino horse should be removed from the parade. Assuming for the purpose of argument, that there is sufficient evidence in the record to justify the inference that Levy was an agent of the respondent Legion Post so that the post would be bound by any knowledge that he received, nevertheless it was not error to exclude the proffered testimony for at least two reasons: (1) The offer of proof made by appellants did not indicate that the proffered testimony would show that notice was given to the respondents that the horse was vicious or obstreperous; and (2) even assuming that the evidence if admitted would have shown such notice was given, nevertheless its admission could not have affected the decision. The offer of proof was as follows: "Mr. O'Connor: At this time, may it please the court, the plaintiffs offer to prove by Mrs. Reid that she had a conversation with Mr. Levy, who was a member of the committee of defendant La Mesa American Legion Post particularly charged with the care and supervision of these horses and the arrangement of the participants in the parade; that Mrs. Reid saw Mr. Levy and told him that he should remove or take out of this parade this horse that was driven by the Slocum boy who is a defendant in this action." This was the only offer of proof made by the appellants and it is clearly insufficient to support their present argument. If Mrs. Reid merely told Mr. Levy that he should remove the horse from the parade and no more, neither Mr. Levy nor the respondent Legion Post received from such statement any information as to the alleged "vicious propensities" of the horse. They did not offer to prove that she stated any reason for her request or even that she had any reason for making it. For aught that appears in the record, she may have asked Levy to remove the horse in an endeavor to see to it that some other horse might win the prize in the parade, or for a number of reasons.

[17] In view of our previous holding that the facts proved were not sufficient to justify a finding that the horse was in fact, prior to the accident, a vicious and obstreperous animal, the rejection of the proffered opinion or statement would not be error resulting in prejudice to appellants. It is not sufficient proof of viciousness to detail the behavior of the animal under the extraordinary circumstances here presented. Finney v. Curtis, 78 Cal. 498, 21 P. 120. It follows that the trial court was justified in granting the respondents' motion for a nonsuit.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

33 Cal.App.2d 478

## PEOPLE v. DE SOTO.

Cr. 1679.

District Court of Appeal, Third District, California.

June 23, 1939.

1. **Criminal law 🔑568**

The intent with which an alleged criminal act was done may be gathered from all the circumstances shown in evidence.

2. **Burglary 🔑45**
**Rape 57(5)**

In prosecution for burglary and attempted rape, whether entry of premises was permissive was for the jury.

3. **Burglary 🔑41(4)**
**Rape 🔑53(1)**

In prosecution for burglary and attempted rape, evidence sustained finding of felonious entry.

4. **Criminal law 🔑564(2)**

Venue of crime need not be proved beyond reasonable doubt.

5. **Criminal law 🔑304(6)**

The city of Stockton, wherein alleged crime was committed, being an incorporated area, court judicially noticed that it was in the county of San Joaquin and properly instructed jury to that effect. Code Civ.Proc. § 2102.

6. **Criminal law 🔑564(5)**

Testimony that crime was committed in apartment on certain street, coupled with testimony of police officers that they were members of police force of city of Stockton, San Joaquin County, and that they were performing their official duties when they arrested accused about a block from the apartment, was sufficient to establish venue.

**7. Criminal law 🔑1177**

Where accused admitted three prior convictions which with conviction of crime for which he was then on trial would constitute him an habitual criminal, subject to life imprisonment, failure to specify whether sentences for burglary and attempted rape should run concurrently or consecutively was not prejudicial.

**8. Criminal law 🔑304(11)**

The courts of California will take judicial knowledge of the laws of sister states, so that proof by prosecution of nature of grand larceny for which accused was admittedly convicted in Nevada to show analogy to grand theft as defined by California statute, in support of finding that accused was an habitual criminal, was not required. Code Civ.Proc. § 1875; Pen.Code, § 487; Comp.Laws Nev. § 10323.

**9. Criminal law 🔑871(2)**

Where jury found accused guilty of both burglary and attempted rape, foreman was not required to sign each verdict but signature at bottom of last count was sufficient. Pen.Code, § 1164.

**10. Criminal law 🔑894**

The opportunity for jurors or accused to object to uncertainty or ambiguity in verdict is presented at time verdict is read to the jury and inquiry made of them whether verdict as recorded is verdict of the jury. Pen.Code, § 1164.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Eddie De Soto, alias Eddie Soto, was convicted of burglary in the first degree, and of attempted rape, and he appeals.

Affirmed.

James I. Harkins, of Stockton, and Eddie De Soto, in pro. per., for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was convicted by a jury of the crimes of burglary in the first degree, and attempted rape. He appeals from the judgment of conviction and from the order denying a new trial.

Briefly the facts as gathered from the transcript show that about 3 o'clock on a Sunday morning in December of last year, the defendant entered a two-story dwelling house located at 524 East Miner avenue in the city of Stockton, where the complaining witness was asleep. She was awakened by the entry of defendant in her room, and at first thought it was a roomer who occupied an adjoining room in the house. Defendant, then threatening to do bodily harm to the complaining witness, attempted to rape her, but was driven away and left the house, taking with him certain personal property belonging to the inmates of the home, consisting of a small amount of money, a bath robe, glasses, a zipper jacket and other small articles. In the meantime the police had been notified of the presence of the defendant in the house, and about a block from the scene of the crime he was arrested, and in his possession was found the stolen property.

[1-3] The first point urged by appellant is that there was no evidence in the record showing that he did not have permission to enter the premises. He did not live at the address, and there is ample evidence that he had not been invited to enter the premises. The intent with which an act was done may be gathered from all the circumstances shown in evidence. The entire question being one of fact for the jury, we need not here do more than state that a reading of the record shows there was ample support for their finding of a felonious entry.

[4-6] The point relied upon by appellant, apparently with the most confidence, is that the prosecution failed to establish the venue, claiming that the testimony established only that the offense charged took place in the apartment house of Angie Newell, without any showing of the county in which the apartment house was located. Mrs. Newell however, testified that her apartment was located at 524 East Miner avenue. One of the witnesses, who also lived in the apartment, testified that he resided at 524 East Miner avenue. A further identification of the premises is established by certain police officers, who testified that they were members of the police force of the city of Stockton, San Joaquin county, and that they were performing their official duties as police officers of said city when they arrested the defendant about a block from the apartment of the complaining witness, 524 East Miner avenue, and that they took him first to the apartment and then to the jail.

As said in People v. Montgomery, Cal. App., 89 P.2d 184, 185: "The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. * * *"

Furthermore, the court, in its instructions, declared to the jury that 524 East Miner avenue was located in the city of Stockton, and that Stockton was in the county of San Joaquin, state of California, which instruction fulfilled the requirements of section 2102 of the Code of Civil Procedure, which provides that whenever the knowledge of the court is made evidence of a fact, the court is to declare such knowledge to the jury.

The city of Stockton being an incorporated area, the court took judicial knowledge of the fact that it was in the county of San Joaquin, and properly instructed the jury to that effect.

[7] Another point urged by appellant is that the trial court erred in the pronouncing of judgment upon the two counts stated in the information. The court, in pronouncing sentence, failed to specify whether the offense for which he stood convicted, that is, burglary and attempted rape, should run concurrently or consecutively; that, however, is immaterial inasmuch as appellant admitted three prior convictions, which together with the conviction for which he was then on trial would constitute him an habitual criminal, subject to imprisonment for life, and it would be immaterial whether or not the court specified the two immediate offenses should run concurrently or consecutively.

[8] Appellant also claims the court erred in finding him to be an habitual criminal. He admitted by his plea that he had been thrice convicted,—once for burglary in the second degree from San Joaquin county, and served a term therefor in San Quentin prison; once for grand larceny in the state of Nevada, and served a term therefor in the state prison of Nevada; and again for burglary in the second degree from San Francisco, and served a term therefor in Folsom prison. He now claims there is nothing in the record to establish that grand larceny as defined by the laws of Nevada (10323, Nevada Compiled Laws) is analogous to grand theft as defined by section 487 of the Penal Code. By virtue of section 1875, Code Civ.Proc., the courts of this state will take judicial knowledge of the laws of our sister states, and therefore by the admission of appellant that he had suffered the conviction in Nevada as set forth in the information, no evidence by the prosecution was required to show the nature of the offense in Nevada.

[9, 10] The last point urged is that the foreman of the jury failed to sign each verdict. Where, as here, the information charged the defendant with more than one count, and the jury found him guilty of all counts, it is sufficient that the signature of the foreman appear at the bottom of the last count. By section 1164 of the Penal Code, the verdict, after being returned by the jury in open court, is recorded by the clerk, and as recorded, read to the jury, and inquiry is made of them if the verdict as recorded is the verdict of the jury. It is then the jurors or the defendant may object to any uncertainty or ambiguity in the verdict as returned.

Finding no error in the judgment or in the order denying the motion for a new trial, the same should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

---

33 Cal.App.2d 607

## ELLIOTT v. KREMER et al.

Civ. 2426.

District Court of Appeal, Fourth District, California.

June 30, 1939.

**Appeal and error 🔑660(2)**

Where appellant's default in the preparation, serving, and filing of a bill of exceptions was not great and respondents were not injured thereby, respondents' motion to dismiss the appeal on ground of appellant's default and insufficiency of order granting relief from default would be dismissed and motion for diminution of record would be granted, since the question of whether trial court abused its discretion in granting appellant relief from default could be better reviewed in connection with the record on the main appeal. Code Civ.Proc. § 473.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action for damages by Lynn Elliott against Melbourne Leroy Kremer and Croxon Trucking Company, a copartnership. From a judgment of nonsuit, plaintiff appeals. On defendants' motions to dismiss the appeal and for diminution of the record.

Motion to dismiss appeal denied, and motion for diminution of the record granted.

Sarau & Thompson, of Riverside, for appellant.

Kelley & Hews, of Riverside, for respondents.

BARNARD, Presiding Justice.

In this action for damages a judgment of nonsuit was entered on October 21, 1938. Notice of appeal was filed on November 21, 1938. On January 24, 1939, an order was entered relieving the plaintiff from default in the preparation, serving and filing of a bill of exceptions and denying a motion of the defendants for an order terminating the preparation of a record on appeal. A bill of exceptions was settled on February 3, 1939, and filed in this court on March 6, 1939.

On April 18, 1939, defendants filed notice of a motion to dismiss the appeal, noticing the same for May 9, 1939. Pursuant to a stipulation this was continued to June 13, 1939. This motion was based upon the grounds that the bill of exceptions was not filed within the time allowed by law, that no adequate showing for relief under section 473 of the Code of Civil Procedure was made by the plaintiff, and that the trial court exceeded its jurisdiction in making the order granting such relief and in receiving and settling the bill of exceptions. The motion was accompanied by and based upon an affidavit of one of the counsel for defendants, a certificate of the clerk and copies of the judgment, notice of entry of judgment, notice of appeal, notice of motion to terminate appeal, an affidavit in support thereof, notice of motion to be relieved from default, several affidavits in support thereof, an affidavit in opposition thereto, the order relieving from default and denying motion to terminate proceedings on appeal, and the trial judge's statement of the objections made by the defendants to a settlement of the bill of exceptions.

On May 13, 1939, the defendants filed a notice of motion for diminution of the record, asking to have the papers last referred to, copies of which were attached to the motion to dismiss, incorporated in and made a part of the record on this appeal. The motion to dismiss and motion for diminution of the record were submitted on June 13, 1939.

The purpose of these motions is to secure a dismissal of the appeal on the general ground that the court abused its discretion in granting the motion for relief and in refusing to enter an order terminating the proceedings for the preparation of a record. It has been held that such orders are not appealable orders and that the sufficiency of an order granting relief from default in preparing a record may be attacked on the appeal from the judgment. Landreth v. Ducommun, 8 Cal.2d 694, 68 P.2d 231. Although not necessary to the decision in that case it was suggested, in Hohnemann v. Pacific Gas & Elec. Co., 29 Cal.App.2d 551, 85 P.2d 151, that an order denying a motion to terminate proceedings for the preparation of a transcript on appeal might also be attacked through a motion to dismiss the appeal.

Assuming that the last-named procedure is proper in some cases it does not follow that it should be permitted and acted upon in all cases. The court has a rather broad discretion in passing upon motions for relief under section 473. Its action in granting such relief might well be sustained upon less grounds in one case than in another. Many things may be taken into consideration and sometimes these are affected by what has previously occurred. It follows that in some cases it may better serve the ends of justice to consider the sufficiency of the order granting relief in connection with the record on the main appeal.

The delay in this instance was not great, there is no indication that the defendants were injured in any way, and there are several circumstances which indicate that justice will better be served by a full presentation of the matter in connection with the appeal from the judgment, with such assistance as counsel may be able to give the court through the usual briefs and argument.

For these reasons and to the end that the matter may be fully presented on the appeal from the judgment, the motion to dismiss is denied. For the same reasons and to the same end the motion for diminution of the record is granted.

I concur: MARKS, J.

33 Cal.App.2d 430

**STANDARD OIL CO. OF CALIFORNIA v. JOHNSON, State Treasurer.**

**Civ. 6096.**

District Court of Appeal, Third District, California.

June 19, 1939.

**1. Commerce 🔑16**

"Interstate commerce" is term of widest import and not restricted merely to transportation of goods across state lines, as commercial intercourse involving such transportation usually involves sale, which may be as much a part of interstate commerce as actual movement of commodity.

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

**2. Commerce 🔑40(1)**

The point of delivery of goods to buyer thereof need not be beyond state of their origin to establish "interstate commerce."

**3. Commerce 🔑40(1)**

The fact that oil, sold in state to companies operating railroads and steamships for use outside state, was delivered to buyers, instead of independent common carriers, does not affect question whether transactions were sales in "interstate commerce" and hence exempt from state retail sales taxes. St. 1933, p. 2599, § 5(a); U.S.C.A.Const. art. 1, § 8, cl. 3.

**4. Commerce 🔑40(1)**

That oil, sold to companies operating railroads and steamships for use in other states, was for buyers' ultimate use, is immaterial on question whether transactions were "sales in interstate commerce" within statute exempting such sales from state retail sales taxes. St.1933, p. 2599, § 5(a); U.S.C.A.Const. art. 1, § 8, cl. 3.

**5. Commerce 🔑40(1)**

Sales of oil in state to companies operating railroads and steamships for buyers' use outside state were sales in "interstate commerce" and hence immune from state retail sales taxes. St.1933, p. 2599, § 5(a); St.1935, p. 1935, § 3; U.S.C.A.Const. art. 1, § 8, cl. 3.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Standard Oil Company of California against Charles G. Johnson, as Treasurer of the State of California, to recover the amount of sales taxes and a deficiency assessment paid under protest. Judgments for defendant, and plaintiff appeals.

Reversed.

Pillsbury, Madison & Sutro, Felix T. Smith, Sigvald Nielson, and Douglas Erskine, all of San Francisco, and Loeb & Loeb and Leon H. Levi, all of Los Angeles, for appellant.

Keating Coffey, of Los Angeles, amicus curiæ.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

We are here considering four appeals from judgments entered after demurrers to plaintiff's amended complaints were sustained. Three appeals involve sales tax paid under protest at the time of payment. The fourth is an action to recover the amount of a deficiency assessment, which was also paid under protest, but all have been consolidated for the purposes of this appeal.

In the first three the Southern Pacific Company was the purchaser of fuel oil, and in the fourth complaint sales of fuel oil to the Southern Pacific Company, Western Pacific Railroad Company, and the Alaska Packers Association were involved, but the basic facts are similar, and we need summarize therefore, only the allegations of one of the causes of action.

The question here for determination as propounded by respondent is "when sales of tangible personal property and deliveries of the same to the buyer take place in California, are the sales exempted from a sales tax (Stats.1933, ch. 1020, p. 2599) by reason of the fact that they are intended to be transported to points outside the state of California, and, in fact, are subsequently so transported by the buyer"?

The facts as established by the allegations of the amended complaints as affects the Southern Pacific Company are, in brief, that the Standard Oil Company is a corporation organized under the laws of Delaware, and is qualified to carry on business in the state of California, and licensed under the Retail Sales Tax Act, supra. The Southern Pacific Company likewise is a corporation, qualified to do business in the state of California, and is organized under the laws of the state of Kentucky. The business of the Southern Pacific Company is the operation of steam railroads in California, Oregon, Nevada, Arizona, Utah, New Mexico and elsewhere. In the operation of its system, the Southern Pacific Company requires fuel oil in quantities not available in the state of Oregon, Nevada, Arizona, Utah and New Mexico, and it must be obtained and brought into these states. The nearest and most practical source of supply for this purpose is the oil fields of California. (In the case of the Western Pacific, that company operates railroads in California, Nevada, Utah and elsewhere, and the Alaska Packers Association operates a chain of steamships from California to points in Alaska.)

In order to obtain fuel oil to meet its requirements the Southern Pacific Company, in January, 1928, entered into a written contract with appellant, Standard Oil Company of California, by which it engaged to buy from appellant its requirements for fuel oil for the operation of its railroads in these states, which appellant agreed to supply.

Appellant's sources of supply of fuel oil, other than its sources of supply in California, are not sufficient to meet the Southern Pacific Company's requirements, and it was expressly contemplated by the parties, and was in fact an economic necessity, that appellant supply such requirements from the sources within the state of California.

It is further alleged that as fuel oil was required for use in the states named, the Southern Pacific Company placed its orders with appellant, which orders were filled by loading the oil into Southern Pacific Company cars at Tracy or El Segundo in California, and then transported to its fixed and certain destination in Oregon, Nevada or Arizona, as determined by the orders and waybills issued at the time of loading.

In opposition to the levy of the tax appellant contends that because the oil was intended to be shipped in interstate commerce at the time of requisition, and in fact was so shipped, the tax would be a burden on interstate commerce, and therefore the sales are specifically exempted by section 5(a) of the Retail Sales Tax Act. Upon the other hand, respondent contends that merely because the sales and deliveries were made in the state of California to the buyer, and were subsequently shipped in interstate commerce, does not exempt such sales from the application of the Retail Sales Tax Act.

Section 3 of the act (as amended by St. 1935, p. 1253) provides, in part, as follows: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes."

Section 5 of the act provides, in part, as follows:

"There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

[1] There is no dispute that the state may not interpose a tax on goods that move in interstate commerce, but just what is interstate commerce is not susceptible of a comprehensive definition, being a term of the widest import. In considering what is interstate commerce, we are not restricted merely to transportation of goods across state lines, for commercial intercourse involving transportation of goods from one state to another usually involves a sale as

of the steps in the transaction, and frequently the sale itself becomes an incident to the interstate movement and may be as much a part of the interstate commerce as the actual movement of the commodity. An illustration of such relationship is found in the shipment of wheat from the grain fields of the west where the farmer sells his grain to a buyer who finds his market at the mills throughout the world, or the coal miner in the Appalachian coal fields who sells his coal at the mine which is then transported to the point of consumption in other states. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458; United States v. Reading Co., 226 U.S. 324, 33 S.Ct. 90, 57 L.Ed. 243; United Fuel Gas Co. v. Hallanan, 257 U.S. 277, 42 S.Ct. 105, 66 L.Ed. 234.

[2] Respondent recognizes the close relationship between sale and transportation but insists the goods must be delivered by the seller to an independent common carrier for transportation to the buyer at a point beyond the boundary of the state of origin. The Supreme Court of the United States, however, before whom this question has been most frequently presented, seems to hold otherwise.

In Dahnke-Walker Milling Co. v. Bondurant, supra, the court, in considering the regulation of interstate commerce said [257 U.S. 282, 42 S.Ct. 108]: "* * * Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. * * * On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

In Lemke v. Farmers' Grain Co., supra, the court said [258 U.S. 50, 42 S.Ct. 245]:

"The record discloses that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread,' or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain, Minneapolis, Duluth or elsewhere. This method of purchasing, shipment and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under federal law.

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle, Dahnke-Walker Milling Co. v. Bondurant, decided December 12, 1921, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239."

So, likewise, in United States v. Reading Co., supra, it is said [226 U.S. 324, 33 S.Ct. 102]: "Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. That the defendants were free to sell again within Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide water, and the sales were made upon the basis of the average price at tide water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Company v. United States, 196 U.S. [375] 396, 398, 25 S.Ct. 276, 49 L.Ed. [518] 524, 525; Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301, 52 L. Ed. 488, 13 Ann.Cas. 815."

As held also in Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954, one selling goods to a buyer in another state is nevertheless engaged in interstate commerce regardless of the fact the goods are delivered for transportation f.o.b. at points within the state of origin.

It would appear from the foregoing, therefore, that the point of delivery to the buyer need not be beyond the state of origin to establish the state of interstate commerce.

[3] Next, does the fact that in the instant case the oil was delivered to the buyer and not to an independent common carrier affect the situation? We think not, for from an examination of Lemke v. Farmers' Grain Co., supra, and Shafer v. Farmers' Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909, we find the buyers took delivery at their own elevators and shipped the grain out of the state when and as they saw fit. In United States v. Reading Co., supra, and United Fuel Gas Co. v. Hallanan, supra, the buyers took delivery and transported out of the state,—in one case in their own cars, and the other through their own pipe lines.

[4] So, also, it would seem to be immaterial that the oil here in question was for the ultimate use of the buyer. It is the economic situation that governs and not the accidental fact that the commodity was to be used by a particular entity or was transported by a particular carrier. The purchase was made because in California and in California only, the commodity is found in commercial quantities near the point of use and transported thence because of a consumer's demand. No oil is produced in Nevada, Utah or Arizona in commercial quantities, and the railroad, operating extensively in those states, must obtain fuel oil requirements where nature has placed the oil, and therefore is compelled to go to California to supply its needs, and to supply that need, transportation is also an element. The demand has created a continuous definite movement out of the state, kept up by economic necessity.

Respondent, in support of his contention that the tax upon the receipts from the sales in question was not prohibited by the regulations of interstate commerce, submits that the case of Superior Oil Company v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 170, 74 L.Ed. 504, supports his contention. In that case a distributor of petroleum in Louisiana sold gasoline to a buyer in Louisiana. The gasoline was delivered to the buyer in Louisiana and transported by him to a fishing fleet in Mississippi under the original bills of lading from the seller consigning gasoline to the buyer in Mississippi. Thereafter the buyer sold the gasoline in Mississippi to certain fishermen who used the fuel in operating their fishing boats, and at the end of the season settled with the buyer in Louisiana. The court there held that this transaction was intrastate and therefore subject to the Louisiana sales tax on the sale of gasoline. There, Mr. Justice Holmes, in considering the transaction, said: "The document [bill of lading] seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for the delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. * * * We may admit that this case is near the line. * * * If by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. * * * A distinction has been taken between sales made with a view to a certain result and those made simple with indifferent knowledge that the buyer contemplates that result."

This, as stated by the court, is a border line case, but it appears from the facts that the presence of the buyer in Mississippi was merely fortuitous. It had no place of business in Mississippi, no actual presence therein. Neither was there any indication of a title of gasoline moving in interstate commerce from Louisiana to Mississippi. Obviously it was, as the court pointed out, an attempt to convert an intrastate sale to a transaction in interstate commerce.

Somewhat analogous in principle is the case of Wiloil Corporation v. Pennsylvania, 294 U.S. 169, 55 S.Ct. 358, 359, 79 L.Ed. 838. In that case the buyer in Pennsylvania purchased gasoline from a seller in Pennsylvania, who acquired the same in Delaware. The gasoline was to be delivered f. o. b. Wilmington, Delaware, and shipped from Wilmington to the buyer's place of business in Pennsylvania. In that case the Supreme Court concluded that since the gasoline could as well have been supplied from sources in Pennsylvania as from sources in Delaware, and since it was a matter of indifference to the buyer whence the gasoline came from, and interstate transportation was not a necessary and essential element of the sale,—the f. o. b. price at Wilmington, Delaware, was nothing more than a price-fixing arrangement. Said the court: "* * * Appellant was not required by the contracts to obtain the fuels at Wilmington, but was free to effect performance by shipping from any place within or without Pennsylvania. * * * These contracts did not require or necessarily involve transportation across a state boundary."

Another case considered in this appeal and relied upon by appellant is Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 486, 67 L.Ed. 865, wherein a merchant in South America, through his agent in New York, purchased a supply of baseball bats for shipment to South America. The bats were delivered by Spalding & Bros. to the agent in New York, and the title was in him before the goods left the state. A taxing agency of the government contended that the sale had been completed in the United States, and that the purchaser, through its agent, had complete title to and control over the property in New York, and might have diverted the use of the property to any use it pleased. The Supreme Court held, however, that the transaction constituted a sale of articles exported from a state and could not be taxed by the United States under the provisions of the Constitution.

The court there said: "Neither does it matter that the title was in Scholtz & Co. [the commission agent acting for the buyer] and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia, and for their account and risk. Theoretical possibilities may be left out of account."

A fourth case is that of Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147, 52 S.Ct. 340, 341, 76 L.Ed. 673, where the court upheld the right of a state to impose a sales tax on sales of gasoline within the state, delivery made therein, even though the buyer subsequently used the gasoline solely as a source of motive power in interstate transportation. There the gasoline was pumped directly into the tanks of planes landing in South Carolina, but operating interstate, and immediately thereafter was used to propel the planes, both within and without the state of Carolina. The court logically held the sale to be intrastate, saying: "* * * But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State upon intrastate dealers."

In the case before us it is clear from the physical facts alleged in the complaint that plaintiff was not attempting to create a fictitious transaction to avoid the imposition of the sales tax as was the case in Superior Oil Company v. Mississippi, supra, for it is obvious that regardless of who may have been assigned the duty of transporting the oil out of California, its point of consumption lay beyond the boundaries of our state.

[5] After examining the many cases which have been submitted to us in the able briefs before us, we are unable to distinguish the case at bar from the principles laid down in the case of Spalding & Bros. v. Edwards, supra, and we are, largely upon the principles there announced, as well as from the general rules governing interstate commerce, compelled to conclude that the transactions before us were sales in interstate commerce and therefore immune from tax by this state under the provisions of clause 3, section 8, of article I of the Constitution of the United States, U.S.C.A., and expressly exempted from the

retail sales tax under the provisions of section 5 (a) of the Retail Tax Act of 1933.

The judgment is reversed.

I concur: TUTTLE, J.

THOMPSON, J., deeming himself disqualified, does not participate in the decision.

---

33 Cal.App.2d 500

## DARR v. CLEVELIN REALTY CORPORATION.

Civ. 11785.

District Court of Appeal, Second District,
Division 1, California.
June 26, 1939.

**1. Vendor and purchaser 🔑341(2)**

A complaint alleging that at time vendor executed grant deed to vendee purported conveyance was not and is not now and never was valid and that vendor was not able to make any valid or legal conveyance of premises to vendee for reason that premises had been conveyed to another was sufficient to set up a cause of action based on the right of a vendee to receive from vendor a good title at time fixed in contract.

**2. Vendor and purchaser 🔑112(1)**

A vendor is in default when vendee has performed his part of the contract for purchase of land and made demand for his title which vendor is unable to furnish.

**3. Vendor and purchaser 🔑145**

After payment of the contract price, the vendor is not entitled to any more than a reasonable time in which to execute the proper conveyance.

**4. Vendor and purchaser 🔑334(5)**

Where vendor owned land at time it contracted to convey land to vendee, but during the executory period vendor conveyed land to another and on date when conveyance was due vendor was unable to furnish title and such inability continued up to time notice of rescission was served and legal action instituted, a period of approximately 21 months, vendee was entitled to rescind and recover money paid.

**5. Vendor and purchaser 🔑341(3)**

In vendee's action to rescind land purchase contract on ground that vendor which owned land at time of execution of contract but conveyed land during the executory period was not able to furnish good title, evidence warranted finding that vendor's transfer of land was not inadvertent.

**6. Vendor and purchaser 🔑334(5)**

In determining vendee's right to rescind because vendor had conveyed title to another during the executory period, court was required only to consider the title as it existed at the time fixed for performance of the contract and delivery of the conveyance.

**7. Vendor and purchaser 🔑341(2)**

Complaint alleging that on performance date title was not vested in vendor and that it did not exist in such vendor for nearly two years after date fixed in contract for execution and delivery of deed was not objectionable on ground that it did not allege tender of performance and demand for a deed by vendee.

**8. Vendor and purchaser 🔑144(2)**

A vendor may have a reasonable time in which to prepare and deliver a deed, but he does not have a reasonable time in which to acquire title to property to enable him to perform his contract.

**9. Vendor and purchaser 🔑334(5)**

Where vendor conveyed title to another during executory period, the fact that vendee accepted deed from vendor in execution of contract did not preclude vendee from suing for rescission, since the purported deed conveyed nothing.

**10. Deeds 🔑94**

Where deed conveys some title, though an infirm or defective title, grantee is limited to the covenants of her deed.

**11. Deeds 🔑94**

Where grantor has no interest whatever in property sought to be conveyed, there is no execution of contract by grantor, nor any merger of contract to convey land in such a deed, and grantee's case depends upon the contract to convey land, for the violation of which grantee is entitled to rescind. Civ. Code, § 1689, subds. 2–4.

**12. Vendor and purchaser 🔑334(5)**

Where vendee instituted action to rescind approximately 21 months after date when conveyance was due from vendor which had conveyed property to another during the executory period, the fact that vendor was in position to convey title at time of trial did not preclude rescission by vendee.

**13. Appeal and error ⚷994(3), 1012(1)**

Weight of evidence and credibility of witnesses were matters for determination of trier of facts.

**14. Appeal and error ⚷994(3), 1012(1)**

A determination regarding weight of evidence and credibility of witnesses cannot be disturbed on appeal unless as a matter of law there was no substantial evidence in record to support findings of trier of facts.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Lenna E. Darr against the Clevelin Realty Corporation to cancel an agreement for purchase of certain real property. Judgment for plaintiff, and defendant appeals.

Affirmed.

John L. Fleming and Robert M. Miller, both of Los Angeles, for appellant.

Ben W. McLendon and Elmer B. Leihammer, both of Long Beach, for respondent.

WHITE, Justice.

The defendant, Clevelin Realty Corporation, has appealed from a judgment canceling an agreement between it and plaintiff for the purchase by the latter from the former of certain real property and directing the return by defendant to plaintiff of the sum of $884.55 paid defendant as purchase money on account of and pursuant to said agreement.

The facts disclosed by the record are as follows: Defendant corporation was the owner of a residential subdivision adjacent to Lake Elsinore in Riverside county. On September 7, 1933, in Los Angeles county, plaintiff and defendant entered into a written contract under the terms of which defendant agreed to sell and convey to plaintiff two lots in said subdivision and plaintiff agreed to purchase the same, paying therefor in monthly instalments. On July 13, 1935, after plaintiff had completed the payments under the agreement, defendant executed and delivered to plaintiff a grant deed to the property in question. It appears, however, that on the date defendant executed the last-named grant deed to plaintiff, the former was not the owner of the property in question, having divested itself of ownership thereof on September 29, 1934, when it deeded said property to Great Coastal Oil Company, a subsidiary corporation of defendant. Discovering these facts, the plaintiff, on April 26, 1937, served upon defendant a notice of rescission, coupled with an offer to return to defendant everything of value received under the contract, and demanding from defendant a return of the purchase money. Four days later, on April 30, 1937, plaintiff commenced this action. On the day of the trial, plaintiff in open court offered to defendant a quitclaim deed of the property in question, while defendant corporation offered to plaintiff an unlimited certificate of title executed by the United Title Guaranty Company of Riverside, California, showing the title to the lots in question to be then vested in the plaintiff. In this connection, it should be said that on May 29, 1937, defendant procured from its subsidiary corporation a deed to the lots, which deed recites:

"This deed is executed and delivered by the grantor and accepted by the grantee for the purpose of vesting title to the premises herein described in the said grantee herein, free and clear of any and all exceptions and/or reservations contained in that certain deed from the Clevelin Realty Corporation to the Great Coastal Oil Corporation, dated and recorded on the 29th day of September, 1934, in Book 196 at Page 81 of Official Records of Riverside County, California, and in that certain deed from the Great Coastal Oil Corporation to Clevelin Realty Corporation, dated the 30th day of April, 1937, and recorded on the 14th day of May, 1937, in Book 320, Page 594 of Official Records, Riverside County, California, it being the intention to vest in the grantee herein title to said premises including all mineral, oil, gas and other hydro-carbon substances, in, upon or under said land, and to cancel any and all exceptions and/or reservations contained in the deeds herein mentioned.

*"This deed is given for the reason that the premises herein described was by inadvertence and mistake included in the real property description contained in said deed recorded in said* Book 196 at Page 81." (Emphasis added.)

Appellant's first ground of appeal is that the trial court erred in overruling its objection to the introduction of any evidence on the ground that the complaint merely averred that during the life of the contract plaintiff vendor conveyed the property to a third person and did not allege any further facts to show that the vendee's rights were not protected. Appellant's claim in this regard cannot be sustained. The complaint alleged that at the time defendant corporation executed the grant deed to plaintiff "said purported conveyance was not and is not now and never was valid or of any force or effect, nor was defendant then or is defendant now able to make any valid or legal conveyance of said premises to this plaintiff, or at all, for the reason that said premises and the whole thereof were on September 29, 1934, conveyed to Great Coastal Oil Company, a corporation, who ever since has been and now is the owner thereof, and that by reason of the aforesaid former conveyance by defendant of said real property to the said Great Coastal Oil Company, a corporation, as aforesaid, which said conveyance is now in full force and effect, the said purported conveyance to plaintiff herein of said real property is ineffectual for any purpose and conveys nothing to this plaintiff".

[1-4] These averments were sufficient to set up a cause of action based on the right of a vendee to receive from the vendor a good title at the time fixed in the contract. The defendant owned the land at the time it contracted to convey the same to plaintiff. Conceding that a person may lawfully contract to sell real estate which he does not own (Lemle v. Barry, 181 Cal. 6, 183 P. 148), and by the same token may divest himself of the ownership of land which he contracts to sell during the executory period of the contract as defendant here did, nevertheless it is firmly established as the law that such grantor is in default when the vendee has performed his part of the contract and made demand for his title which the vendor is unable to furnish. Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338, 132 Am.St.Rep. 72. The complaint sufficiently alleged the inability of defendant to deliver title to the property at the time called for by the contract because it had theretofore conveyed the land in question and was not then the owner thereof. Cases cited by appellant relate to defaults allegedly occurring during the executory period of the contract and before performance by the vendor was due or required. The decisions are uniform in holding that after payment of the contract price the vendor is not entitled to any more than a reasonable time in which to execute the proper conveyance. Haight v. Salter, 260 Mich. 6, 244 N.W. 209; Myers v. Fidelity-Philadelphia Trust Co., 290 Pa. 283, 138 A. 834; Ellwood v. Niedermeyer, 12 Cal.App.2d 699, 56 P.2d 279. The complaint in the instant case specifically alleged that on the date when a conveyance was due from defendant the latter was unable to furnish the same, and that such inability continued up to the time notice of rescission was served and legal action instituted—a period of approximately twenty-one months.

[5] Appellant insists that the evidence clearly and decisively shows that the deed from appellant to its subsidiary corporation, Great Coastal Oil Company, was the result of a mutual mistake on the part of the grantor and grantee in such deed, and that there never existed any intention on the part of the grantor therein to convey away the two lots it had contracted to sell to respondent. Be that as it may, time was of the essence of the contract between appellant and respondent, and by its terms appellant was required to furnish to respondent as grantee a policy of title insurance when such grantee completed her contractual payments. Had appellant complied with this requirement contained in the agreement, its non-ownership of the property in question would have been disclosed. We are impressed with the fact that the conduct of appellant warranted the finding by the trial court that its transfer of the lots in question to its subsidiary corporation was not inadvertent.

[6-8] Appellant's claim that the complaint is fatally defective because it does not allege tender of performance and a demand for a deed by the vendee, or in lieu thereof allege facts showing that such demand would be useless, is without merit. That appellant had knowledge of the fact that a deed was due is evidenced by its action in executing and delivering a purported deed under date of July 30, 1935, and by its letter to respondent under date of August 8, 1935, transmitting such deed to the latter. Appellant's default was created by its failure to anticipate its obligation to acquire ownership of the property it had bargained to sell to respondent, and its not being prepared to deliver a deed that would in fact vest in respondent title to the property. Respondent was entitled to rest upon the provisions of the contract. In determining her rights, we must only consider the title as it existed at the time fixed for

the performance of the contract and the delivery of the conveyance. Therefore, where, as here, the complaint alleges that on the performance date title was not vested in the grantor and that it did not exist in such grantor for nearly two years after the date fixed in the contract for the execution and delivery of the deed, the pleading is not subject to the last-named criticism directed at it by appellant. As was said in Walsh v. Colvin, 53 Wash. 309, 101 P. 1085, 1088, "While a vendor may have a reasonable time in which to prepare and deliver a deed, he does not have a reasonable time in which to acquire title to the property to enable him to perform his contract. If a vendor agrees to convey title at a given time and has no title when the date for performance arrives, the question of a reasonable time for preparing a deed does not enter into the case. It is a breach of the agreement to convey for which the purchaser may at once rescind." Appellant at its peril divested itself of title to the property which it had contracted to sell. Its default was occasioned by its failure to place itself in a position where it could carry out on the performance date the contract it had made.

[9-11] It is next contended by appellant that because the grantee accepted a deed from the grantor in execution of the contract, the former cannot sue in rescission, but is relegated to an action on the deed and not upon the agreement. The fallacy in appellant's argument in this regard lies in the fact that the purported deed conveyed nothing. It was but a scrap of paper, because appellant was bereft of any interest whatever in the land it pretended to convey. The rule contended for by appellant would be applicable if *some* title, though an infirm or defective title, had been conveyed by the deed in question. Confronted with such infirmities or defects in the title, the grantee would have been limited to the covenants in her deed, but where, as in the instant case, the grantor has no interest whatever in the property sought to be conveyed, there was no execution of the contract by such grantor, nor any merger of the contract in such a deed, and the grantee's case depended upon the agreement, for the violation of which she was authorized to rescind. Civ.Code, § 1689 subds. 2, 3 and 4.

[12-14] What we have heretofore said with reference to the duty resting upon appellant to acquire ownership of the property and be prepared to execute a valid deed thereto on the performance date provided for in the agreement to sell, is a complete answer to appellant's final claim that because at the time of the trial it was prepared to and actually had conveyed the property to respondent, the latter suffered no damage and was not entitled to relief on the ground of failure of title. The court was warranted in believing that as early as January 28, 1937, when appellant wrote respondent to come to the former's office and bring her deed to the property, as appellant "would like to check same with our office records", that appellant was aware of some irregularity in the conveyance to respondent. The weight and intrinsic value of this and other evidence supporting respondent's claims, as well as the credibility of the witnesses who testified in the case, were all matters for determination by the trial court, and under familiar rules, such determination cannot be disturbed on appeal unless we can say as a matter of law that there was no substantial evidence in the record to support the findings of the trier of facts. No such stricture can be imputed to respondent's evidence in the case before us.

The attempted appeal from the order denying the motion for a new trial is dismissed.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

33 Cal.App.2d 544

## In re POMIN'S ESTATE.

**Civ. 6244.**

District Court of Appeal, Third District, California.

June 28, 1939.

Hearing Denied Aug. 24, 1939.

**1. Evidence ⚷571(7)**

A probate judge need not fix compensation of an executor for extraordinary services at estimated value fixed by experts, though no witness disputes the expert opinion, but judge in exercise of sound discretion may determine weight of evidence and value of services and allow executor such sum as the court may deem just and reasonable. Probate Code, § 902.

**2. Evidence ⚷571(7)**

The testimony of experts with respect to value of extraordinary services rendered by an executor incident to probating of an estate, or in maintaining the business of a summer resort in connection therewith, is subject to critical examination and is not conclusive on a court or jury. Probate Code, § 902.

**3. Executors and administrators ⚷497**

In determining the amount which executor should be allowed for extraordinary services, court was entitled to consider entire compensation paid to executor for ordinary services, including the nature and value of services rendered, whether compromise of suit by him was advantageous to estate, and whether summer resort conducted by him was conducted at a profit or at a loss. Probate Code, § 902; Code Civ.Proc. § 1618, as amended, St.1909, p. 252, St.1925, p. 624.

**4. Evidence ⚷571(7)**

The allowance of only $2,978.30 for extraordinary services rendered by executor in supervising operation of summer resort, in settling a lawsuit, and in adjusting a claim for revenue taxes was not an abuse of discretion, though there was no oral evidence to refute expert testimony that services were reasonably worth $6,000. Probate Code, § 902.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Proceeding in the matter of the estate of Marian E. Pomin, also called Mrs. Frank J. Pomin, and Mrs. F. J. Pomin, deceased, wherein Ed. W. Genberg, executor, in his final account, asked for additional compensation for extraordinary services in the sum of $6,000. John F. Snyder and others, devisees, legatees and distributees, filed an opposition to the allowance of the additional compensation. From an order allowing the executor $2,978.30, compensation for extraordinary services, the executor appeals.

Affirmed.

E. J. Rice, Jr., of San Francisco, for appellant.

Frank J. Hennessy, of San Francisco, for respondent Homer A. Snyder.

I. Karmel, of San Francisco, for respondents Edith S. Gregory and John F. Snyder.

Lowell & Lowell, of Auburn, for the estate.

Mr. Justice THOMPSON delivered the opinion of the court.

The executor of the last will of Marian E. Pomin, deceased, has appealed from an order allowing him $2,978.30, in compensation for extraordinary services under the provisions of section 902 of the Probate Code, on the ground that it is inadequate.

Only one question is involved on this appeal. It is contended the court abused its discretion in allowing the executor only about one-half of the compensation which he demanded for extraordinary services since there was no oral evidence to refute the testimony of expert witnesses in his behalf to the effect that the services were reasonably worth $6,000.

The deceased died July 10, 1936, possessed of an estate valued at $182,579.70, consisting of real property of the value of about $70,000, including a summer resort on Lake Tahoe known as "Pomin's Resort"; furniture and equipment of the value of about $17,000; securities in the nature of stocks and bonds of the value of $31,769.09; cash on hand in an amount in excess of $38,000; jewelry appraised at $1,300 and other personal property. One annual account was settled prior to the final account. The executor was allowed regular commissions for administering the estate in the sum of $2,978.30. His attorney was allowed regular fees in a similar amount. In his final account which was filed in May, 1938, the executor asked for additional compensation for extraordinary services amounting to $6,000 and his attorney demanded $1,250 for his unusual services. The court allowed the attorney's fees in the full amount demanded, and that item is not involved on this appeal. The court in its discretion allowed the executor as additional compensation the same amount which he was paid as regular commissions for administering the estate, to-wit: $2,978.30. The unusual services of the executor consisted of supervising the operation of the summer resort through one season, settling a lawsuit which was brought against the estate for alleged damages amounting to $29,000, and adjusting a claim of $150 for revenue taxes. The suit was compromised by paying the plaintiff therein the sum of $19,356.64. We are not informed of the merits of that compromise. The executor did not personally maintain the summer resort. He employed Mabel Swain as a manager, who was paid from the estate a salary of $1,250 in 1936 and $1,800 in 1937. The season lasted from May to September. During the time the executor acted as executor of the estate he was employed as the active manager of the Polk-California branch of the American Trust Company at San Francisco. But he did visit the Pomin Resort "week ends, and at other times while it was open". He spent seven days there at one time, and devoted much time to its maintenance.

The executor and three expert winesses testified that his extraordinary services were reasonably worth $6,000. The heirs filed an opposition to the allowance of the additional compensation claimed by both the executor and the attorney. The matter was, however, submitted to the court for determination on the evidence adduced by the executor, together with the proceedings of the estate, which were before the court. The court found that "the facts disclosed by the evidence did not warrant the allowance of * * * said sum of $6000.00"; that said sum "was excessive and the executor was not entitled to be allowed * * * more than the sum of $2978.30 for said extra * * * services".

The court thereupon allowed the executor the sum of $2,978.30 as compensation for extraordinary services, which is exactly the amount previously allowed for his regular services for administering the estate. From that order this appeal was perfected.

[1] There appears to have been no abuse of discretion on the part of the trial judge in allowing the executor only $2,978.30 as compensation for extraordinary services in connection with his probating the estate of said deceased person, in spite of the fact that no oral evidence was adduced to rebut the testimony of expert witnesses called by the executor to prove the value of such services. We are of the opinion a probate judge, who has before him all of the proceedings of an estate, together with evidence of the exact nature of extraordinary services performed incident to probating it, is not bound to fix the compensation therefor, under Section 902 of the Probate Code, at the estimated value testified to by expert witnesses produced by the executor, even though no witness is called to dispute their opinions in that regard. It is the province of the trial judge, under such circumstances, in the exercise of sound discretion, to determine the weight of the evidence and the value of the services performed and to allow the executor or attorney such sum "as the court may deem just and reasonable for any extraordinary services". Sec. 902, Probate Code; Zimmer v. Kilborn, 165 Cal. 523, 132 P. 1026, Ann.Cas.1914D, 368; Estate of Broome, 162 Cal. 258, 263, 122 P. 470; Estate of Larzelere, 4 Cal. App.2d 483, 486, 41 P.2d 362; Estate of Parker, 186 Cal. 671, 200 P. 620.

Section 902 of the Probate Code authorizes the court to determine and award only "such further allowances * * * as the court may deed just and reasonable for any extraordinary services". In the case of Zimmer v. Kilborn, supra, an appeal from a judgment which was rendered for less than the amount claimed in a suit for an assigned claim of a special administrator and his attorney for services rendered by both, in which there was no evidence to rebut the plaintiff's expert testimony as to the value of the services performed, the judgment was affirmed. The court said: "The first point made by appellant is that there was no evidence to justify the verdict as to the amount of the recovery. It is true that all of the expert witnesses sworn on behalf of plaintiff testified that the services rendered were of greater value than $500. * * * The fact that the defendant offered no evidence to contradict that of the attorneys who testified regarding the value of the services rendered by plaintiff's assignors did not prevent the jurors from considering the matter in the light of their own experience nor cut them off from the right to return a verdict in favor of plaintiff for a sum less than that mentioned by any witness if, in their discretion, they believed the amount returned by their verdict a sufficient compensation for the work performed. The opinions of experts in such cases as this are not binding upon the jury. See Spencer v. Collins, 156 Cal. [298, 303] 306, 104 P. 320, 20 Ann.Cas. 49, and cases cited."

The preceding case determines the very point contended for by the appellant in the present proceedings. Here it is insisted there is a clear showing of an abuse of discretion on the part of the judge in allowing less than any witness testified the extraordinary services were worth. Certainly if jurors have the right to weigh the evidence of expert witnesses and exercise their own knowledge of the valuation of the services of either an attorney or an administrator in determining the amount to award in compensation therefor, a probate judge, who has all the proceedings before him, together with evidence of the exact nature of the services performed, may use his wide knowledge and experience in the probating of estates to determine in an exercise of sound discretion what amount he "may deem just and reasonable" to compensate the services.

[2] The testimony of expert witnesses with respect to the value of personal services rendered by an executor incident to the probating of an estate, or in maintaining the business of a summer resort in connection therewith, is subject to critical examination, since it constitutes mere opinions susceptible of prejudice or speculation. Such opinion testimony has been termed weak and unsatisfactory. Jones Ev. Civil Cases, 3d Ed., p. 591, secs. 390, 391. The authorities are uniform in holding that such opinion evidence is not conclusive upon a court or a jury. 22 C.J. 595, sec. 691; 2 Jones Ev. Civil Cases, 4th Ed., p. 730, sec. 386a; Ann.Cas.1914D, 369; Zimmer v. Kilborn, supra. In 22 Corpus Juris, supra, it is said in that regard: "The probative weight to be accorded to the estimates of witnesses as to value is entirely a matter for the jury, whose action is not controlled by the fact that the evidence of the witness is uncontradicted."

The appellant concedes that the foregoing rule applies to the fixing of compensation of an attorney at law. In affirming an order for attorney's fees under circumstances similar to those of the present case, where the appellant contended that the trial court was bound by the uncontradicted evidence of expert witnesses, the court said, in Freese v. Pennie, 110 Cal. 467, at page 469, 42 P. 978, 979: "The true rule is the one there announced, and that is, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law. While such evidence is proper, and always admissible by way of assisting the court in arriving at a conclusion, it is not at all conclusive upon the trial court; and it is for that court to say, upon a consideration of all the evidence, taken in connection with its own best judgment, what would be a fair and just allowance for the services rendered."

We see no valid reason for distinguishing between the authority of the court in fixing just and reasonable compensation of either attorneys or executors for services rendered in the course of probating an estate in all of which matters the probate judge is presumed to be skilled. We are of the opinion the same rule prevails with respect to the fixing of compensation for extraordinary services of both attorneys and executors under the provisions of the Probate Code. In Estate of Fulton, 23 Cal.App.2d 563, 567, 73 P.2d 664, 666, it is said in that regard: "Section 902, supra, leaves the matter within the sound discretion of the trial court, and does not make it mandatory upon the court to grant extra allowance of fees on account of services. In making such allowance or disallowing a claim therefor, the trial court necessarily takes into consideration the value of the estate, the work performed by the attorney in the routine administration thereof, and the amount to which the attorney would legally be entitled, calculated according to the provisions of the Probate Code, and, if the sum allowed by law appears to be a reasonable compensation, even though the attorney may have performed some extraordinary services, it is within the sound discretion of the trial court to disallow claims for extra compensation, and, unless it appears that there has been an abuse of discretion, an appellate court is not at liberty to disturb the conclusion of the trial court."

[3] Accordingly, it follows that, in the present case, it was proper for the court to consider the entire compensation paid to the executor for his ordinary services in administering the estate, including the question as to the nature and value of the

services he rendered; whether the compromise of the damage suit was advantageous to the estate, and whether the summer resort was conducted at a profit or at a loss to the estate. The record discloses the fact that the cash receipts from the summer resort during the season of 1937 were $24,184.26, while the amount expended on that account was $27,160.95. The very fact that the executor was paid for extraordinary services an amount equal to the entire sum which he received for his regular services may be some indication that the extra compensation allowed was not inadequate. Section 1618 of the Code of Civil Procedure, which formerly provided for compensation for extraordinary services, limited the amount to one-half of the regular commissions allowed by the statute. Stats.1909, p. 252. That section was amended in 1925, St.1925, p. 624, so as to eliminate the limitation of the sum which might be allowed for extraordinary compensation. Still it would seem to be proper in determining the "just and reasonable" sum to be allowed as extra compensation to take into consideration the ratio which it bears to the amount of commissions allowed for regular services performed.

[4] Considering the entire record, we are of the opinion the trial court allowed the executor a just and reasonable amount for extraordinary services. At least, it does not appear there was an abuse of discretion on his part in making the allowance.

The order is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 482

## PEOPLE v. GONZALES.

Cr. 1682.

District Court of Appeal, Third District, California.

June 23, 1939.

**1. Infants** 🔑20

In prosecution for lewd and lascivious conduct with a child, testimony of prosecutrix, 11 years of age, corroborated in essential respects by testimony of physician and which did not appear to be result of coaching and which was not so inherently improbable as to appear on its face false, was sufficient to sustain conviction. Pen.Code, § 288.

**2. Criminal law** 🔑510

In prosecution for lewd and lascivious conduct with child under 14 years of age, evidence of prosecutrix need not be corroborated by other testimony to sustain conviction. Pen.Code, § 288.

**3. Infants** 🔑20

In prosecution for lewd and lascivious conduct with a child under the age of 14, weight and sufficiency of evidence to support verdict are generally exclusively matters for determination of jury. Pen.Code, § 288.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Ralph Gonzales was convicted of lewd and lascivious conduct with a child under 14 years of age, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted on three counts of an information charging him with violations of section 288 of the Penal Code.

The appellant contends the evidence fails to sustain the verdicts and judgment for conviction of the several counts for the reason that the testimony of the prosecutrix is inherently improbable.

[1] There is no merit in the appeal. We have read the entire record. There is an abundance of evidence to sustain the verdicts and judgment. The prosecutrix was an intelligent girl eleven years of age. Her mother died in 1936, leaving her without a home. She was thereupon placed in the custody of the Catholic Welfare Bureau, and entrusted to the care of Mr. and Mrs. Gonzales in Sacramento, at the expense of the county. She looked upon them as her foster parents and called the defendant "father". The evidence clearly

shows that the defendant took advantage of his dominion and authority over the child and surreptitiously planned to gain her submissive acquiescence to his immoral desires. She told a very clear story of his lascivious conduct which extended over a period of several months, culminating in statutory rape. He warned her not to tell of his conduct, threatening that if she did so she "would be put away" in an orphanage, which she greatly feared. She submitted to his advances for about six months and then, having developed an infection on account of his treatment, she told her foster mother of the criminal assaults, and she promptly instigated an investigation. The girl's story is straightforward and convincing, in spite of some inaccuracies which may be reasonably reconciled. Doctor George E. Chappell, an experienced physician and a member of the medical staff of the Sacramento County Hospital, made a careful examination of the child and corroborated her story in some essential respects.

The case at bar is in no way parallel with the facts disclosed in People v. Harden, 24 Cal.App. 522, 141 P. 1075, and several others relied upon by the appellant. In the case last cited the child was but six years of age and apparently she was mentally incapable of comprehending and relating facts accurately. She had evidently been coached by her mother to testify to certain damaging evidence. She admitted that her mother told her what to testify to at the trial. In the case of People v. Hamilton, 46 Cal. 540, upon which the appellant also relies, the child was under ten years of age, and failed for more than two years to disclose the criminal conduct of the accused person. The court said that her evidence was inherently improbable. No such situation exists in the present case. In this case the evidence does not appear to be inherently improbable. In fact, it seems to be reasonable and true. In a rigid cross-examination the prosecutrix consistently adhered to her story in all material circumstances. It is corroborated in some respects by the testimony of the physician. It does not appear that any person had coached her with respect to her testimony.

The case of People v. Bose, 28 Cal.App. 743, 153 P. 965, which is cited by the appellant, does not sustain his contention. In that case the judgment was affirmed, and the Supreme Court denied a hearing. The court there said: "The prosecutrix testified positively to facts constituting the offense, and it was for the jury to determine whether she was telling the truth. We cannot say that her story is inherently improbable."

[2, 3] While it is true that judgments of conviction under section 288 of the Penal Code have been reversed, where the uncorroborated story of an infant child is so inherently improbable as to appear on its face to be false and that it is procured by the coaching of an incensed parent and that it is the result of passion and prejudice on the part of jurors (16 Cal.Jur. 14, § 11), it is not necessary that the evidence of the prosecutrix shall be corroborated by other testimony, and the weight and sufficiency of the evidence to support the verdict are ordinarily exclusively matters for the determination of the jury. People v. Raich, 26 Cal.App. 286, 146 P. 907. Many cases supporting convictions of the offense which is here involved are cited in 7 California Jurisprudence Ten Year Supplement, page 563 (Supp. to 16 Cal.Jur. § 11), some of which are based on facts far less convincing than the evidence of the present case.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

## TAYLOR et ux. v. POLE et al. *

**Civ. No. 12163.**

District Court of Appeal, Second District, Division 2, California.

June 23, 1939.

Hearing Granted Aug. 21, 1939.

**1. Appeal and error 🔑1064(1), 1066**
**Damages 🔑213**
**Trial 🔑253(6)**

In automobile case, instruction that if jury should find that change in plaintiff's condition was "due to a combination involving aggravation of her then condition plus exaggeration on her part of the aggravation," and "that there is no testimony" from which to determine how much was aggravation and how much was not, then plaintiffs would have failed to establish amount of aggravation and jury must resolve the issue in favor of defendants, was prejudicially erroneous in referring to "testimony" rather than to "evidence" and in not leaving damages to jury's sound discretion.

---

*For subsequent opinion see 107 P.2d 614.

**2. Trial** ⟹253(6)

Instructions should not confine jury to the "testimony" of witnesses but should tell jury to consider all the "evidence."

**3. Damages** ⟹96

The amount of general damages for personal injuries must be left to jury's sound discretion.

**4. Evidence** ⟹21

It is common knowledge that it is the almost universal custom for plaintiffs in personal injury actions to present their injuries in the manner most favorable to their contentions, and for defendants to minimize the extent of injuries.

**5. Damages** ⟹213

In action for personal injuries suffered in automobile collision, wherein defendant offered evidence that plaintiff's ailments were mostly caused by her hysteria antedating the accident, and were not permanent, court should tell jury in simple language that it was within their sound discretion to determine from all the evidence the amount of damages suffered because of aggravation of pre-existing ailments.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Austin H. Taylor and wife against Rupert Pole and others, for damages resulting from an automobile collision. From an insufficient judgment, plaintiffs appeal.

Reversed and remanded.

Richard Dunnigan and Burton B. Crane, both of Los Angeles, for appellants.

Nourse & Jones, of Los Angeles, for respondents.

WOOD, Acting Presiding Justice.

Plaintiffs commenced this action to recover a judgment for damages which they suffered when the automobile in which they were riding was struck by an automobile driven by defendant Rupert Pole, whose application for a driver's license was signed by defendants Helen and Lloyd Wright. The jury returned a verdict in favor of plaintiff Mae M. Taylor in the sum of $650. The jury also returned a verdict in favor of Austin H. Taylor but allowed him no damages whatever, although it was shown that his automobile was damaged to such an extent that it was necessary to spend $117.64 to repair it. The trial court denied plaintiffs' motion for a new trial upon the condition that defendants pay into the court for the plaintiffs the sum of $117.64. In presenting this appeal plaintiffs contend that the sum awarded to Mrs. Taylor is so grossly inadequate as to compel the conclusion that the verdict was the result of passion and prejudice; and that the court committed prejudicial errors in giving instructions to the jury. No question is presented on the issue of the liability of the defendants.

An examination of the record discloses a very decided conflict in the evidence on the issue of the damages suffered by Mrs. Taylor. According to plaintiffs' evidence Mrs. Taylor received bruises and lacerations, one of which on the left shin required suturing. A nerve in her left leg was severed, and plaintiffs presented evidence that this injury was of a permanent nature resulting in the dragging of her left foot in walking and causing the left leg to become an inch smaller than the right leg. She also presented evidence to establish that the injuries received at the time of the accident caused her eyes to cross, headaches to frequently occur, a nervous affliction to the entire left side of her body, arm and leg and internal pain. Mrs. Taylor testified as to her previous good health and called medical experts who testified that in their opinion the injuries of which she complained, other than the lacerations and bruises above mentioned, were caused by a blow which Mrs. Taylor said she received on her head at the time of the accident. Physicians for Mrs. Taylor presented bills aggregating the sum of $1,075.

A very different picture is presented by the evidence of defendants. On their behalf evidence was introduced tending to establish that since Mrs. Taylor was five years of age she had been subject to fits in which she would lose consciousness and would on occasions injure herself while unconscious. These fits were variously referred to as "epileptic", "hysterical" and "hallucinations". In addition to presenting evidence that Mrs. Taylor's eyes were crossed long prior to the accident defendants' medical experts testified that all of the ailments of which she complained except the impaired use of the left foot were of an hysterical nature and that the hysteria antedated the accident. In the opinion of defendants' experts the injuries to Mrs. Taylor's left leg were not of a permanent nature.

It will be observed at once that the jury was confronted with the problem of deciding whether Mrs. Taylor received very severe injuries in the accident and was entitled to substantial damages or whether she was making false claims as to her injuries when as a matter of fact the injuries were only slight. The instructions given by the trial court were unusually numerous and lengthy. In view of the amount of the verdict, considered in connection with the extent of the plaintiffs' claims of injuries, it becomes necessary to scrutinize the instructions to determine if the jury was fairly instructed on the rules applicable to the measure of damages.

In accordance with plaintiffs' claims the court instructed the jury that plaintiffs were entitled to recover for aggravation of plaintiff's preexisting ailments caused by the negligent acts of defendant Pole. In doing so the court gave to the jury defendants' instruction No. XVIa, of which plaintiffs vigorously complain and which is as follows: "You are instructed that if you find that because of Mrs. Taylor's preexisting conditions, whatever they may have been, there was a change in her subsequent to the accident, and further find that such change was due to a combination involving aggravation of her then condition plus exaggeration on her part of the aggravation, and if you find that there is no testimony from which you can determine how much is aggravation and how much is not, then the plaintiffs have failed to establish by a preponderance of the evidence the amount of aggravation, and in such event you cannot arbitrarily fix the aggravation but will resolve the issue in favor of the defendant and against the plaintiffs because of plaintiffs' failure to establish by a preponderance of the evidence."

[1-5] This instruction is erroneous, and in view of the nature of the evidence in this case must be considered as so prejudicial as to require a new trial. It will be observed that the jury was told that if there was no testimony from which they could determine how much plaintiffs had exaggerated Mrs. Taylor's condition the jury should find for defendants on this issue. The jury should not have been confined to the testimony of the witnesses but in considering this and other points it was their duty to consider all of the evidence and they should have been so instructed. Numerous exhibits were received in evidence, including a large number of photographs presented by both parties. There is, however, a more serious and fundamental objection to this instruction. The rule is well established that the amount of the general damages must be left to the "sound discretion" (Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480) and "good sense" (Lee v. Southern Pac. R. Co., 101 Cal. 118, 35 P. 572) of the jury. "The law prescribes no definite measure in such a case, but leaves the amount of damages to the sound discretion of the jury." Fernald v. Eaton & Smith, 40 Cal.App. 498, 180 P. 944, 945. The instruction in question does violence to this general rule, for the jury were told that they must determine from the testimony of the witnesses how much the plaintiffs were indulging in exaggeration and if they were unable to so determine they should award plaintiffs nothing whatever for the aggravation of preexisting ailments caused by the conduct of defendant Pole. It is a matter of common knowledge that it is the almost universal custom for plaintiffs in actions for damages for personal injuries to "put their best foot forward"; to present their injuries in the manner most favorable to their contentions. In making allowances for the propensities of mankind judges and juries realize that such is the custom. Even in sales of property a certain amount of "puffing" is allowed. Alexander v. Stone, 29 Cal.App. 488, 156 P. 998. On the other hand, it is common knowledge that it is the almost universal custom for defendants to minimize the extent of the injuries suffered by plaintiffs in actions of this kind and judges and juries make due allowances for such custom. Both parties as a rule employ experts, as they did in this case, to give their opinions in the manner most favorable to the parties engaging their services. In the instruction under review the trial court was induced to instruct the jury to place upon plaintiffs the burden of accurately establishing before the jury the exact amount of the injuries suffered by plaintiffs in the matter of aggravation of past ailments and to tell

them that if they could not determine from the testimony how much the injuries suffered by Mrs. Taylor had been exaggerated they were to give her nothing on this account. In this the court erred, for it should have told the jury in simple language that it was within their sound discretion to determine from all of the evidence the amount of the damages, if any, which plaintiffs had suffered by reason of the aggravation of her preexisting ailments caused by the negligent acts of the driver of the car. An approval of the instructions under consideration would, in effect, bring about the abrogation of the "sound discretion" rule which has long been applied in this state to actions for personal injuries.

The judgment is reversed and the cause remanded for retrial upon the sole issue of the amount of damages suffered by plaintiffs.

I concur: McCOMB, J.

---

33 Cal.App.2d 518

## PEOPLE v. DIAMOND.

Cr. 3185.

District Court of Appeal, Second District, Division 1, California.

June 27, 1939.

**1. Weapons 🔑17(6)**

The offense of exhibiting deadly weapon in rude, angry, or threatening manner is not included in a charge of assault with intent to murder, and hence, in prosecution for assault with intent to murder, court may properly refuse to charge on exhibiting deadly weapon. Pen.Code, § 417.

**2. Criminal law 🔑1173(1)**

In prosecution for assault with deadly weapon, refusal to give instruction based on theory that the only offense committed was the crime of exhibiting a deadly weapon was not prejudicial error where jury was instructed that they must acquit if the evidence failed to show assault of any kind. Pen. Code, § 417.

**3. Indictment and information 🔑189(2)**

The offense of exhibiting a deadly weapon in a rude, angry, or threatening manner, or using such weapon, is not necessarily included within the crime of assault with a deadly weapon. Pen.Code, § 417.

**4. Assault and battery 🔑97**

In prosecution for assault with deadly weapon, in two counts, wherein evidence indicated that defendant displayed a gun but was doubtful on whether defendant actually committed assault, trial court should either acquit defendant or find him guilty of assault with gun, rather than finding him guilty of assault with gun and of exhibiting deadly weapon. Pen.Code, § 417.

**5. Weapons 🔑17(8)**

Under statute providing six months in county jail as maximum imprisonment for exhibiting deadly weapon, sentencing defendant to term of one year on conviction of exhibiting deadly weapon was error, though the term was ordered to run concurrently with sentence imposed on another count, for assault with deadly weapon. Pen.Code, §§ 19, 417.

◆

Appeal from Superior Court, Los Angeles County; Frank Collier, Judge.

Louis Diamond was convicted of assault with a deadly weapon and of assault, and he appeals.

Reversed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

By information appellant was charged in two counts with the crime of assault with a deadly weapon. Upon trial before the court sitting without a jury, he was found guilty of the crime of assault with a deadly weapon, as charged in count II of the information, and also guilty of violation of section 417 of the Penal Code, "a lesser offense than that charged in count I of the information but necessarily included therein". This appeal is prosecuted from the judgments of conviction which were thereafter entered herein.

The record discloses that the complaining witness Kiser was operating a service station located on premises owned by appellant, and on July 30, 1938, as charged in count II of the information, the two men had an argument over a statement purportedly made by Kiser to a man named Sutton. With reference to this occasion, the complainant testified that he was standing in front of the door of the service station and appellant was standing on the sidewalk, when the latter pulled a revolver out of his pocket which he held with his arm straight at the side with the muzzle of the gun pointing to the ground, and then whirling the gun around his head, but at no time pointing it at complainant, appellant said: "Don't come any closer; your life is in danger." Appellant denied having a gun in his possession and testified that he had accused Kiser of telling a lie and trying to make trouble and had told him "You are not going to make a Hitler place around my place." Appellant further testified that he had been shining his shoes and had a piece of gray cloth in his pocket which he pulled out when complainant Kiser came toward him. Upon this occasion Kiser called the police, but no arrests were made.

Peace apparently reigned between the two men for a little while, during which time appellant advertised for rent a garage located upon the said premises near the service station, but on August 21, 1938, another argument took place between them which caused appellant to be charged, as set out in count I of the information, this occurrence being testified to as follows by complainant Kiser: "* * * he left the keys for me to rent the garage when he went to Long Beach, so I didn't get the garage rented and I cleaned and swept it out, and I had my old Buick truck setting in there, and I had the doors open, and he (appellant) told me if I wanted my car left in there I was supposed to pay him $20.00 a month rent. So he told me to get it out of there right away. So I went and got it out and I drove it out in front of the garage, and I said, 'Diamond, you are no man of your word at all.' And I started out in my little Buick truck back in the garage, and he pulled the gun on me again, but he stayed in the garage when he did it. * * * I just got out of the old car——just probably ten feet out of the garage, and started back, and going to help him lock up the doors. I told him he was no man of his word. And he must have thought I was going to start something, because he pulled the gun on me again. * * * He told me the same thing, that my life was in danger; not to come near the garage. So I took his word for it." In answer to the question "Did he point the gun at you on that occasion?" complainant replied, "Well, he had it a little bit more at me in the garage than he did out on the street." (He having testified that the gun was pointed at the ground on the occasion of July 30th, when appellant was standing in the street.)

The deputy sheriffs, who placed appellant under arrest after this second occurrence, testified that appellant repeatedly denied he had a gun, but finally admitted he had one upstairs in his bedroom where he handed it over to the officers, one of whom testified that the gun was loaded at that time.

At the conclusion of the trial, the court made the following comment:

"As to the first count, I don't know. There are only two things that stand out, that Mr. Sutton heard 'Don't come any closer; your life is in danger,' but he didn't see Mr. Diamond at the time the remark was made. Consequently, he doesn't know whether he had a gun or not. On both of these occasions the sheriff's office was telephoned to promptly. On both occasions the officers came, but the testimony varies as to the dates. There wouldn't be any occasion for a great big chap like Mr. Kiser telephoning to the sheriff's office, if all that Mr. Diamond had in his hand, on the first occasion particularly, was a gray shoe rag. That doesn't stand to reason either. He could take Mr. Diamond by one hand and do plenty of damage to him. I am convinced that on the first occasion there was a gun, particularly in view of the fact that Mr. Diamond lied on both occasions to the officers about the gun. He denied it on both occasions. It wasn't until they questioned him pretty hard on the second occasion that he admitted he had it. I find the defendant guilty on the first count. Now, as to the second count ——

"Mr. Smith: Count one, your Honor, or is that the first occasion?

"The Court: The first occasion.

"Mr. Smith: That is count two.

"The Court: Well, that is the first occasion. We have an abundance of testimony there. As to the second occasion, the corroboration is very slight. All that we have there is that again Mr. Kiser telephoned to the sheriff's office. Nobody overheard that altercation. The boy back there, Forthum, simply knows that after it was all over Mr. Kiser again telephoned the sheriff's office, and the men came down and they found the gun in that instance, but no one overheard the remarks, 'Stay away or your life is in danger.' As to the second occasion then, I shall find that he did draw and exhibit a gun, as provided in section 417 of the Penal Code, and on the first occasion, I find him guilty of assault with a deadly weapon. And he is remanded to the custody of the sheriff."

Subsequently judgment was rendered "that the defendant be confined in the County Jail of the County of Los Angeles for the period of one year, and pay a fine in the sum of $100.00; that in lieu of the payment of that fine he be incarcerated at the rate of a day for every $2.00. The sentence on each count to run concurrently."

Appellant urges that (1) the evidence "is insufficient to justify the verdicts as to either count of the information"; (2) the court was not authorized to find him guilty of a violation of section 417 of the Penal Code; (3) the judgment as to count I of the information was erroneous.

As hereinbefore stated, the information charged appellant with the commission of the crime of assault with a deadly weapon on July 30, 1938, with respect to which count the trial court found him guilty as charged. The evidence adduced in connection with this particular occurrence reveals that, while standing on the sidewalk in front of the service station at a distance of approximately six feet from the complainant Kiser, the appellant pulled a gun out of his pocket, "held it with his arm straight at the side, and the muzzle pointing at the ground, and then with a whirling motion he whirled it around his head, still holding it in his hand and swinging it around his head", at no time pointing it at the complainant, and said: "Don't come any closer; your life is in danger." The deputy sheriff McVine, who responded to complainant's report of the incident which occurred on July 30th, testified that appellant denied he had a gun, and when said officer asked appellant if the latter would be willing to have his house searched, appellant laughed and said, "I'm an honest man; you can take my word for it." Apparently the officer acquiesced in this view, because he further testified that he did not locate the gun on that occasion. The witness Sutton testified that he was present and heard appellant say "Don't come any closer; your life is in danger," and that, although both men were close to him and in plain view, he did not see appellant in possession of a gun. This testimony was corroborated by the witness Forthum, who was also present at this first altercation on July 30th. Appellant denied he pointed a gun at complainant, and testified that he had been shining his shoes and had put a piece of gray cloth in his pocket before he left his house, and "just to scare the big man away from me, I took it out and said, 'Don't come nearer.'"

It therefore appears that in so far as this first altercation is concerned, and with respect to which the appellant was found guilty of the crime of assault with a deadly weapon, the evidence is insufficient to sustain the judgment of guilt. No evidence of an actual assault is revealed by the record. The complaining witness admitted that the gun was not pointed at him and neither was it seen by either the witness Sutton or the witness Forthum, both of whom were present at the time in question. Furthermore, it was not located by the deputy sheriff, who subsequently called and questioned appellant with respect to it. In fact, it was not until almost a month later, at the time the second altercation took place, that a gun was finally produced.

As to the occurrence of August 21, 1938, as charged in count I of the information, the trial judge, as hereinbefore set out, commented upon the weakness of the evidence and found the appellant guilty of a violation of section 417 of the Penal Code. Said section provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, or any other deadly weapon whatsoever, in a rude, angry or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor."

[1, 2] "This offense is not included in a charge of assault with intent to murder, and therefore on a trial on an information charging the latter offense, the court may properly refuse to charge the jury upon the subject matter of section 417 of the Penal Code. (People v. Piercy, 16 Cal. App. 13, [116 P. 322].) So, also, upon a

prosecution for an assault with a deadly weapon the refusal to give an instruction based on the theory that the only offense committed was the crime of exhibiting a deadly weapon does not constitute prejudicial error where the jury is instructed that if the evidence failed to show an assault of any kind it would be their duty to acquit the defendant. (People v. Delucchi, 17 Cal.App. 96 [118 P. 935].)" 26 Cal.Jur. 578, § 5.

[3–5] In the circumstances presented by the record herein, it cannot be said as a matter of law that the offense denounced by section 417 of the Penal Code is one necessarily included within the crime of assault with a deadly weapon. It was the duty of the trial court under the evidence adduced either to acquit appellant or find him guilty of the crime charged in count I. Since the maximum imprisonment for a violation of section 417 of the Penal Code is six months in the county jail (Pen. Code, sec. 19), it was error to sentence appellant to a term of one year in the county jail, even though that term was ordered to run concurrently to the sentence imposed on count II.

For the foregoing reasons the judgments herein are, and each of them is, reversed.

We concur: DORAN, J.; WHITE, J.

---

33 Cal.App.2d 586

## CONDRA v. ERRETT.

Civ. 12260.

District Court of Appeal, Second District, Division 1, California.

June 30, 1939.

**1. Municipal corporations 🔑205, 206**

Under charter provisions of the city of Los Angeles giving board of each department power to supervise the department and to create necessary positions and authorize necessary employees and fix their salaries and duties and relating to control of special fund, water and power department is vested with authority to apply public funds to the payment of salary of an employee during the absence of such employee from official duty, but the propriety of paying such salary during his absence is a matter addressed to the judgment of the employer. St.1935, p. 1363, § 395.

**2. Constitutional law 🔑73**

Court of Appeal was without power to pass upon the wisdom of water and power department of city of Los Angeles in the reasonable exercise of its authority to apply public funds to the payment of salary of an employee during the absence of such employee from official duty.

**3. Mandamus 🔑107**

Where department of water and power of city of Los Angeles passed resolution for payment of salary for period not exceeding 15 days to any officer or employee absent from service of department for purpose of engaging in performance of ordered military and naval duty, mandamus against chief accounting employee of the department to compel payment of salary to city engineer while temporarily engaged upon military duties was not the proper remedy where the board had full authority to enforce its own resolutions, fix the duties of its employees and to require performance thereof.

Original proceeding in mandamus by Ralph J. Condra against Clyde Errett, chief accounting employee of the Department of Water and Power of the City of Los Angeles to authenticate and deliver a salary demand upon the city treasurer in favor of petitioner.

Peremptory writ denied, and alternative writ theretofore issued discharged.

John Oliver and Walter S. Barrette, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Mark A. Hall, Asst. City Atty., all of Los Angeles, and Gilmore Tillman, Deputy City Atty., of San Francisco, for respondent.

DORAN, Justice.

This is an original proceeding in mandamus to compel respondent, as chief accounting employee of the Department of Water and Power of the City of Los Angeles, to authenticate and deliver a salary demand upon the city treasurer in favor of petitioner.

The material facts stated in the petition may be summarized as follows: that petitioner was and is an employee of the Department of Water and Power of the City of Los Angeles, in the capacity of senior surveyor; that he is the holder of a commission as first lieutenant of engineers (reserve) in the Army of United States of America; that some time prior to August 14, 1938, petitioner received orders from his superior officers in the United States Army to report for military duty as reserve officer of the engineer corps in the vicinity of San Luis Obispo, California, from August 14 to August 27, 1938, which duties were performed at the specified time by the petitioner; that prior thereto, namely, on May 12, 1938, the city council had adopted ordinance No. 79,755, providing for the payment of salary, for a period not exceeding fifteen days in any fiscal year, to any officer or employee absent from the city service "for the performance of military or naval duty under competent orders"; that on June 16, 1938, the board of water and power commissioners of the city of Los Angeles adopted resolution No. 1113, similarly providing for the payment of salary, for a period not exceeding fifteen days in any fiscal year, to any officer or employee absent from the service of the department for the purpose of engaging in the "performance of ordered military or naval duty"; that petitioner has complied with all the procedural requirements contained in said ordinance and resolution as conditions precedent to the payment of salary, and that there has been presented to the respondent a claim or demand for the salary provided for the position held by the petitioner, for the period above mentioned, but that the respondent has refused to authenticate the demand.

Section 395 of the Military and Veterans Code of California, St.1935, p. 1363, provides that "Every officer and employee of the State, or of any county, municipal corporation * * * who is a member of * * * the reserve corps or force in the Federal military * * * service, shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty. * * * During the absence of any such officer or employee, while engaged in the performance of ordered military or naval duty as a member of the National Guard, Naval Militia, or reserve corps or force in the Federal military, naval, or marine service, he shall receive his salary or compensation as such officer or employee, if the period of such absence in any calendar year does not exceed thirty days."

Ordinance No. 79,755 of the city of Los Angeles is in substance as follows: "The People of the City of Los Angeles do ordain * * * Section 1. That Section 395 of the Military Code of the State of California, providing that any city officer or employee shall be permitted to absent himself from the city service for the performance of military or naval duty under competent orders, as such section now exists, is hereby adopted under the provisions of Charter Section 2, subsections 4 and 5; provided that no salary or compensation in excess of that for fifteen (15) days in any fiscal year shall be paid by the city to any officer or employee absent in the performance of such duty".

Resolution No. 1113 adopted by the board of water and power commissioners provides in part as follows: "Be It Resolved by the Board of Water and Power Commissioners of the City of Los Angeles, that any officer or employee of the Department of Water and Power of the City of Los Angeles who is a member of the National Guard or the Naval Militia of the State of California, or a member of the reserve corps or force in the Federal military, naval, or marine service, * * * shall, subject to the provisions hereinafter set forth, be permitted to absent himself from his duties or service for said Department for the purpose of engaging, * * * in the performance of ordered military or naval duty, * * * Be It Further Resolved that any such officer or employee who thus engages in the performance of any such ordered military or naval duty * * * and who for that reason is absent from his duties or service for the Department, shall, subject to the provisions hereinafter set forth, be entitled to his regular salary or compensation as such officer or employee, for a period of not to exceed fifteen (15) days of such absence in any fiscal year."

It is conceded by appellant, as argued by respondent, that while section 395 of the Military and Veterans Code may require that employees of any body subject to state jurisdiction shall receive their compensation while engaged upon military affairs, such provision "has no efficacy insofar as the compensation of the employees of a chartered municipal corporation is concerned". It is further asserted, in substance, that while the city council is given general authority respecting the compensation of city officers and employees (sec. 33, charter of Los Angeles), nevertheless the Department of Water and Power is given control of its own definite revenue or funds (secs. 33 and 428, charter) and is empowered to "create the necessary positions in said department, authorize the necessary deputies, assistants and employees and fix their salaries and duties". (Sec. 86, charter.) Therefore, it is maintained, the compensation of the petitioner, who at all of the material times was an employee of the Department of Water and Power, is not affected by the terms of ordinance No. 79,755, but is controlled rather by the action of the board of water and power commissioners. Up to this point it appears that both petitioner and the respondent are in full agreement.

The instant controversy, however, arises from the interpretation to be given to the power of the board of water and power commissioners with respect to the expenditure of funds for the payment of salaries to employees while temporarily engaged upon military duties.

With regard thereto petitioner contends that under certain sections of the Los Angeles charter, the board is given the broadest possible powers within the sphere of employment, and that the authority of the board would appear to be unlimited. These sections read in part as follows:

(Sec. 78, Los Angeles charter.) "The board of each department shall have power * * * to supervise, control, regulate and manage the department and to make and enforce all necessary and desirable rules and regulations therefor and for the exercise of the powers conferred upon the department by this charter."

(Sec. 86, Los Angeles charter.) "The board of each department * * *, the finances of which are not included in the general budget, but which department itself has control of definite revenues or funds, as elsewhere in this charter set forth, shall provide suitable quarters, equipment and supplies for the department. It shall create the necessary positions in said department, authorize the necessary deputies, assistants and employees and fix their salaries and duties * * *."

Section 428 of the charter provides: "Whenever in this charter the terms 'departments having control of their own special funds' and 'departments which have control of definite revenues and funds' and other substantially equivalent terms are used the departments included therein, and affected thereby, shall in all cases be * * * the Water and Power Department".

Respondent, however, calls attention to the limitations imposed upon the board in the matter of making expenditures. It is argued by respondent, in this connection, that "The funds derived from the operation of this municipal utility are by the charter carefully segregated from the general funds of the city, available for general municipal purposes (Charter, sec. 220), and are, in effect, dedicated to the extension, maintenance and operation of the municipal utility system and the redemption of indebtedness incurred in connection therewith (Charter, sec. 221)". It is respondent's position that resolution No. 1113 adopted by the board is an attempt to expend funds for a purpose prohibited by the charter, and is arbitrary and invalid.

[1, 2] Although the foregoing summary is somewhat extensive, the conclusions may be disposed of briefly. Notwithstanding the arguments and contentions of the parties as above recited, the petition presents but two questions: First, Was the board of water and power commissioners, under the circumstances above set forth, vested with power and authority to apply public funds to the payment of the salary of an employee during the absence of such employee from official duty. That sections 78, 86 and 428 of the Charter, recited above, clearly vest such power and authority in the board of water and power commissioners there can be no question. It is unnecessary to give consideration to the reasons which prompted such board to permit petitioner to remain absent from work for two weeks without a reduction or suspension of salary. It is sufficient if it is shown that the board had the power so to do. In that connection, however, it should be noted that because petitioner during his absence from work attended to military duties, it does not follow that the salary paid to him by the Department of Water and Power was an expenditure of funds prohibited by the charter. Petitioner was a permanent employee whose salary was paid by the month, and the propriety of paying such salary during his absence was a matter addressed to the judgment of the employer. The court is without power to pass judgment upon the wisdom of the board in the reasonable exercise of such

authority, upon the showing herein presented. For a discussion of the subject of the power and authority of the board of water and power commissioners see Mesmer v. Board of Public Service Commissioners, 23 Cal.App. 578, 582, 138 P. 935.

[3] Secondly, is the writ sought by petitioner appropriate? In connection with the petitioner's effort to enlist the assistance of the court under the circumstances here presented, it should be noted that the respondent is one Clyde Errett, chief accounting employee of the Department of Water and Power of the City of Los Angeles, and not the Department of Water and Power itself. It should be emphasized in this regard that the Department of Water and Power, according to the petition herein, passed the resolution No. 1113 providing for "the payment of salary, for a period not exceeding fifteen days in any fiscal year, to any officer or employee absent from the service of the department for the purpose of engaging in the performance of ordered military and naval duty", as hereinabove recited in the resolution. So far as the record discloses, the board of water and power commissioners has full authority to enforce its own resolutions, fix the duties of its employees and to require the performance thereof. There appears to be no need for any court action by way of assistance to the board of water and power commissioners under the circumstances here presented.

For the foregoing reasons the peremptory writ is denied and the alternative writ heretofore issued is discharged.

We concur: YORK, P. J.; WHITE, J.

---

33 Cal.App.2d 550

**Ex parte BURT.**

**Cr. 443.**

District Court of Appeal, Fourth District, California.

June 28, 1939.

**1. Criminal law 🔑90(3)**

A prosecution on complaint charging violations of Agricultural Code was not triable in justice court in which complaint was filed since statute permits a year's imprisonment for such an offense. St.1933, p. 286, § 1273; Pen.Code, § 1425.

**2. Criminal law 🔑147, 157**

Prior to amendment adding words "or complaint" to statute providing that indictment for misdemeanor must be found or an information or complaint filed within one year after its commission, a prosecution for misdemeanor was barred if information was not filed in Superior Court within one year after its commission, except where defendant had been absent from state, but filing of complaint in justice's court prevented running of statute in low misdemeanors as distinguished from high misdemeanors. Pen. Code, §§ 801, 1425, 1426a.

**3. Criminal law 🔑147**

The court was required to presume that something was intended by amendment adding words "or complaint" to statute providing that indictment for misdemeanor must be found or information "or complaint" filed within one year after its commission. Pen. Code, § 801.

**4. Criminal law 🔑147**

The amendment adding the words "or complaint" to statute providing that indictment for misdemeanor must be found or information "or complaint" filed within one year after its commission referred to the filing of a complaint in a justice's or police court and extended the rule established by existing statute providing that complaint for misdemeanor triable in a justice or police court must be filed within one year after its commission, to cases which might be triable in the Superior Court, placing all high misdemeanors under the same rule regardless of the court in which they might be triable. Pen.Code, §§ 801, 1426a.

**5. Criminal law 🔑152**

The statute providing that where a defendant is out of the state an indictment may be found or an information filed within a year after his coming in the state relates only to the situation where a defendant is out of the state. Pen.Code, § 802.

**6. Criminal law 🔑152**

The provisions of statute providing that where defendant is out of the state an indictment may be found or an information may be filed within a year after his coming within the state would be effective where defendant was absent from state and where complaint had not been filed within a year. Pen.Code, § 802.

**7. Criminal law ⚷152**

The fact that prior to amendment adding words "or complaint" to statute providing that indictment for misdemeanor must be found or information or complaint filed within one year after its commission, exception was allowed by statute providing that where defendant is out of state indictment may be found or information filed within a year after his coming within the state, and fact that exception was retained after amendment, did not manifest intent that amendment was intended to make no change in the effect of the statute amended. Pen.Code, §§ 801, 802.

**8. Criminal law ⚷157**

A prosecution on information charging violations of Agricultural Code which was filed in Superior Court after arrest of accused in December, 1937, on warrant issued on complaint filed October 30, 1934, in justice's court in which prosecution was not triable was not barred by limitations since filing of complaint in justice's court stopped running of statute of limitations. Pen.Code, §§ 801, 1425; St.1933, p. 286, § 1273.

◆

Proceeding in the matter of the application of C. A. Burt for writ of habeas corpus.

Writ discharged and petitioner remanded.

Edward Lynch, of San Francisco, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

BARNARD, Presiding Justice.

The petitioner seeks his release from jail, to which he was committed for a period of two years.

[1] A complaint was filed in the justice's court of Perris township, county of Riverside, on October 30, 1934, charging the petitioner, in respective counts, with five violations of sec. 1273 of the Agricultural Code, St.1933, p. 286. The action was not triable in that court since the statute permits a year's imprisonment for such an offense. Pen.Code, sec. 1425. A warrant of arrest was issued on October 30, 1934, but petitioner was not apprehended and arrested until December, 1937. After a preliminary hearing and the filing of an information in the superior court of Riverside county, the petitioner pleaded guilty to two counts of the information and on March 9, 1938, was sentenced to serve one year in jail on each count, the sentences to run consecutively.

The sole contention here made is that the charge against the petitioner was barred by the statute of limitations since the information was not filed in the superior court within one year after the offenses were committed. The question presented is whether or not the filing of a complaint in a class "B" justice's court tolls the running of the statute of limitations in a misdemeanor case which is not triable in such a court. The respondent contends that the filing of such a complaint within a year tolls the statute, while the petitioner contends that under section 801 of the Penal Code a prosecution by information is barred unless an information is filed in the superior court within one year of the commission of the offense.

[2] Section 801 of the Penal Code reads: "An indictment for any misdemeanor must be found or an information *or complaint* filed within one year after its commission." The italicized words were added to that section by amendment in 1933, St.1933, p. 1678. As the section read prior to that amendment, it was held, in People v. Ayhens, 85 Cal. 86, 24 P. 635, that a prosecution for such an offense was barred if an information was not filed in the superior court within one year after its commission, except where the defendant had been absent from the state. The petitioner contends that the addition of the words "or complaint" in 1933 did not change this rule. It is argued that the word "complaint", thus added, is either synonymous with the word "information" or that the word "information" was intended to apply "to high grade misdemeanors triable in the superior court" and the word "complaint" was intended to be applied only to "low grade misdemeanors" triable in a lower court. If the word "complaint" was intended to be synonymous with the word "information" nothing was added to the section by the amendment. It is unreasonable to believe that the word "complaint" was intended to apply solely to misdemeanors which are triable in any justice's court because section 1426a of the Penal Code already covered such a situation in exactly the same way. That section reads: "A complaint for any misdemeanor triable in a justice's or police court must

be filed within one year after its commission." Under either alternative suggested by the petitioner the 1933 amendment to section 801 would add nothing thereto and would be meaningless.

Prior to this amendment the filing of a complaint in a justice's court prevented the running of the statute of limitations in what may be called low misdemeanors, but did not have this result in the case of what may be termed high misdemeanors. Regardless of whether or not such a distinction between the two classes of misdemeanors was justifiable a new situation arose in 1929 when section 1425 of the Penal Code was amended to provide that justice's courts in cities or townships having a population in excess of 30,000 should also have jurisdiction of what we have referred to as high misdemeanors. Thereafter, the filing of a complaint in what is now called a class "A" justice's court would, by reason of section 1426a, stop the running of the statute in the case of a high misdemeanor, which was then triable in that court, while under section 801, as it then read, a different result would obtain where a complaint was filed in a class "B" justice's court charging a similar offense which was triable in a superior court. This had the unreasonable and perhaps unconstitutional result that, where a defendant could not be apprehended, the question of whether or not a prosecution, other than by an indictment, was barred by the filing of a complaint in a justice's court depended upon the place in which the offense was committed.

[3, 4] While matters thus stood section 801 was amended by adding the words "or complaint". It must be presumed that something was intended thereby. The reference could not be to the filing of a complaint in the superior court because none is to be filed there, in such a case. The added words must refer to the filing of a complaint in the justice's court, and must refer to something other than what was already covered by section 1426a. In view of the situation which had prevailed since the enlargement of the jurisdiction of certain justice's courts in 1929, with the resulting unreasonable distinction between places where high misdemeanors might be committed, as above pointed out, it can only be inferred that this amendment was adopted to meet this situation. The amendment referred to the filing of a complaint in a justice's or police court, but extended the rule established by section 1426a to cases which might be triable in the superior court. By so providing the legislature corrected the situation which had existed since 1929, and placed all high misdemeanors under the same rule, in this respect, regardless of the court in which they might be triable.

[5-7] The petitioner argues that in adding the words "or complaint" to section 801 the legislature could not have intended to refer to the filing of a complaint in a justice's court because it did not repeal section 802 which provides that where a defendant is out of the state an indictment may be found or an information filed within a year after his coming within the state. That section relates only to the one situation where a defendant is out of the state. While it is true that its provisions would be less needed and probably would be relied upon less frequently when the statute could be tolled by the filing of a complaint in the justice's court, its provisions would still be effective where a defendant was absent from the state and where a complaint had not been filed within a year. Neither the fact that such an exception to the rule established by section 801 was previously allowed, nor the fact that this exception was retained when that section was amended in 1933, indicates that the amendment was intended to make no change in the effect of that section.

The petitioner further argues that it is unreasonable to believe that the legislature intended to permit the filing of a complaint in a justice's court to stop the running of the statute of limitations, in such a case, and thereby permit such a charge to hang over a defendant during the remainder of his life. Assuming that as the statute formerly read it may have been possible for a defendant to escape prosecution through the filing of an information by concealing himself for a year, there is no vested right to have such a possibility continued. Any defendant can protect himself from the danger of having such a charge hanging over him by demanding a hearing. No reason appears why the defendant in such a case should be in a more favorable position than other defendants in similar cases, merely because of the place in which the offense was committed. The amendment in question merely corrected an existing discrepancy by extending an existing rule to other similar cases, and by making the rule uniform regardless of what court had jurisdiction to try the case.

[8] We therefore hold that under section 801 of the Penal Code, as amended in 1933, the filing of this complaint in the justice's court stopped the running of the statute of limitations, and that nothing which here appears prevented the prosecution of petitioner on these charges through the filing of an information in the superior court.

The writ is discharged and the petitioner is remanded to custody.

I concur: MARKS, J.

---

## In re LAMPMAN'S ESTATE. *

## PITCHER v. LAMPMAN.

### Civ. 12174–S.

District Court of Appeal, Second District, Division 1, California.

June 28, 1939.

Hearing Granted Aug. 24, 1939.

**1. Executors and administrators** 🔑495(3)

Where executrix took possession of deceased's property, collected income therefrom and, during course of administration, sold property for price in excess of its appraised value to purchaser who assumed and agreed to pay trust deed against the property, executrix was entitled to commissions based upon gross value of estate accounted for by her including the value of the property as of the date of sale without deducting the amount of the trust deed encumbrance. Probate Code, §§ 901, 920.

**2. Executors and administrators** 🔑109(3)

The amount and elements of expense of administration for services rendered to the estate by third persons rest in the sound discretion of the court, and a disallowance of such items cannot be disturbed upon appeal in the absence of an abuse of such discretion.

**3. Executors and administrators** 🔑109(3)

The probate court's reduction from $150 to $60 the amount to be paid an accountant for services rendered to executrix in the preparation of her first and final account and of income tax returns was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

In the matter of the estate of Jay B. Lampman, also known as J. B. Lampman, deceased, wherein the first and final account and petition for distribution filed by Marion L. Pitcher, as executrix, were contested by Helen T. Lampman. From a judgment approving the first and final account and petition for distribution, fixing the statutory fees of the executrix and her attorney, and reducing fees paid to an accountant who assisted executrix, the executrix appeals.

Judgment affirmed in part and reversed in part, with directions.

Frank C. Dunham and M. Everett Burton, both of Pasadena, for appellant.

Morin, Newell, Brown & Hamill, of Pasadena, for respondent.

YORK, Presiding Justice.

This is an appeal from that portion of the judgment approving first and final account and petition for distribution fixing the statutory fees of the executrix and her attorney, and also from that portion of said judgment reducing the fees paid to an accountant who assisted executrix in the preparation of said account and of income tax returns.

A summary of the facts necessary to an understanding of the questions presented by this appeal is, briefly, as follows: The testate, just prior to his death, acquired in a trade an apartment house located in the city of Glendale, subject to a trust deed which was never signed by decedent, and upon which a balance of $38,000 remained unpaid at the date of his death. When the inventory in decedent's estate was returned, an appraisal of said apartment house was shown at $42,500. During the pendency of administration, this property was sold and the probate court made its order confirming sale at an agreed purchase price of $47,500, under the terms of which the purchaser was to pay $14,003 to the estate in cash, and to assume the balance of $33,497 which remained unpaid on the trust deed.

In her first and final account and petition for distribution, executrix accounted for a total estate of $67,799.42, and using that figure as a basis for computation of statutory fees, sought the approval of the court to the payment of $1,507.99 on account of her commissions as executrix, and an equal amount for her attorney. Respondent, as a judgment creditor of said estate, filed objections to said allowance, and also to the payment of $150 to an accountant for services rendered to the executrix in connection with said accounting and for preparing income tax returns for the years 1937 and 1938, and she also objected to the payment of $75 to said accountant for preparing income tax returns for the year 1936.

---

*For subsequent opinion see 100 P.2d 488.

Upon the hearing of said account and objections thereto, the court found as follows:

"A. The Court finds that at the date of the death of the above named decedent, there was a Trust Deed of record on the real property belonging to the said Estate, upon which there was due approximately $35,000, and that said real property was sold by the said Executrix, said sale having heretofore been approved and affirmed by said Court for the sum of $47,500, the said purchaser paying to the said Executrix the sum of $14,003 and agreeing to assume and pay the holder of said Trust Deed the balance then due on the said Trust Deed, to-wit, the sum of $33,497.

"B. The Court further finds that there has been no claim filed by the holders of said Trust Deed with the said Executrix and that because of the foregoing facts there should be first deducted from the total amount of the Estate accounted for by said executrix, to-wit, the sum of $67,799.42, the sum of $33,497, being the amount due on said encumbrance, as hereinbefore set forth, leaving net balance of said Estate to be accounted for by said Executrix in the sum of $34,302.42, upon which the statutory fee for the said Executrix and her said attorney should be fixed, making the fee of said Executrix and her said attorney in the sum of $1016.05 to each instead of the sum of $1507.99 to each, as set forth in said Executrix' Account."

The court allowed executrix $300 additional and her attorney $500 additional fees for extraordinary services rendered to said estate; allowed $75 paid to the accountant for preparing income tax returns for year 1936, and reduced from $150 to $60 the amount paid to said accountant for preparing income tax returns for 1937 and 1938, and for services rendered in connection with said first and final account.

This appeal is prosecuted by said executrix from the order and decree which was thereafter entered, urging that statutory fees should be based upon the gross amount of the estate accounted for, and that "the lower court was in error, in deducting the amount of the encumbrance due on the apartment house, which the purchaser agreed and assumed to pay, and thereafter fixing the statutory fee on the balance, towit, $34,302.42, instead of $67,799.42."

It is also contended by appellant that the court erred, first, in holding that executrix exceeded her authority in employing the accountant to assist her in the preparation of her first and final account and paying him $150 for such services, and, second, in reducing said amount to the sum of $60 which the court found to be reasonable sum to be allowed said accountant "for his services rendered in the preparation of Federal and State income tax returns".

By the terms of section 901 of the Probate Code, "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows. * * *"

Section 920 of the Probate Code provides that "Every executor and administrator is chargeable in his accounts with all of the estate of the decedent which comes into his possession, and with all the income, issues and profits of the estate. * * *"

The quoted portion of said section 920, supra, is based upon former section 1613 of the Code of Civil Procedure, which was repealed in 1931, reading as follows: "Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate."

In connection with the question of the computation of executor's commissions as affected by a lien on property of the estate, the following annotation appears in volume 46, A.L.R. at page 239: "In view of the practical importance of the question and the fact that it is seemingly one which would often arise in the administration of estates, there are surprisingly few adjudicated cases upon it. The cases that have passed upon it present such a variety of facts, points of view, and conclusions, that it is impossible to cite them accurately under any precise general rule. In some instances the manner in which the executor or administrator treated the transaction, rather than its essential character, seems to have influenced the result. In other cases the court seems to have gone behind the form and looked at the real nature of the transaction, and denied commissions on the gross receipts notwithstanding that a colorful aspect was given to the transaction which would support a technical argument in favor of the claim for commissions on that basis."

Appellant cites in support of her first point the Estate of Pease, 149 Cal. 167, 85 P. 149, in which it appears that there was a sale by the executor of certain land in Alameda county which was subject to a mortgage of $882, which had been presented as a claim against the estate and allowed. The sale was for $1500, and the probate court allowed commissions only on the net amount realized after deducting the amount of the mortgage from the amount for which the property was sold. The court there said, 149 Cal. at page 171, 85 P. page 151: "We think commissions should have been allowed on the entire $1,500. An executor or administrator is to be allowed commissions based on the value of the estate which has been taken into his possession and accounted for. Estate of Simmons, 43 Cal. 543, 549; In re Ricaud's Estate, 70 Cal. 69, 11 P. 471. Here the executor testified: 'I never got the $1,500. I only got what was left after paying off the mortgage.' The ruling of the trial court was based, apparently, on the view that the $1,500 had not come into the executor's possession. The general rule appears to be that where property subject to an incumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the incumbrance. 2 Woerner's Am. Law of Adm., 2d Ed., [p.] 1166; Buerhaus v. De Saussure, 41 S. C. 457, 19 S.E. 926, 20 S.E. 64; Baucus v. Stover, 24 Hun, N. Y., 109; cf. Hitchcock v. Mosher, 106 Mo. 578, 17 S.W. 638. An examination of these cases indicates that what was sold was merely the equity of redemption, and it may well be held that where property is sold subject to an incumbrance which still remains, the commissions should be calculated only on the value of the interest sold. Here, however, the mortgage had been presented as a valid claim against the estate. The sale was not made to the mortgagee, but to a third party. Under the Code of Civil Procedure, § 1569, where there is a sale of lands subject to a mortgage or other lien, the purchase money must be applied first to the satisfaction of the mortgage or lien. The property offered for sale and sold is not the equity of redemption (as it may, for this purpose, be termed), but the entire interest of the estate, regardless of the mortgage. It is the executor's duty to apply the purchase price to satisfying and removing the lien for the benefit of the purchaser, and this was done here. The statement of the appellant that he did not get the $1,500, but only the surplus over the mortgage, can mean at most that the purchaser or a broker paid the mortgagee directly, instead of paying the full price to the executor and having him pay off the mortgage. But this does not alter the real nature of the transaction. Whoever paid the mortgagee did it as agent of the executor. In effect, the executor sold the land for $1,500, and with the proceeds paid off the mortgage debt. 'The executor is bound to account to the court for the entire proceeds of sales made under its order.' Estate of Turner, 128 Cal. 388, 392, 60 P. 967. *In this account the executor charged himself with the sum for which the sale was made, and he should be allowed commissions on it.* 'It would be a narrow construction of the statute to hold, that because he did not demand its delivery that therefore in law he did not receive nor pay out that for which he was responsible as received and paid out.' Huddleston v. Kempner, 87 Tex. 372, 28 S. W. 936." (Italics added.)

In Estate of Patton, Myr. Prob. page 241, certain of the property belonging to the estate was treated as separate property and other portions were treated as community property by the referee, who was appointed to ascertain and report to the court as to what property came into the hands of the executor; what, if any, remained for distribution, and what portion, if any, was community property. With regard to commissions due to the executors the court there held: "Each estate is chargeable with executors' commissions on its *gross amount*, with proper average of the legal per-centages; with all specific expenses incurred in its own preservation, care and management, and with its proportion, according to the gross amount of each estate respectively, of the general expenses of administration, so far as now paid or accrued." (Italics added.)

In the Estate of Marvin, Myr.Prob. at page 163, it was held that where an undivided interest in lands subject to a mortgage has been set off to the estate in the district court and the tract sold to complete the partition and satisfy the mortgage, the administrator "can have commissions upon the estate's share of the surplus only." As its reason for such ruling the court then went on to say: "The property, to the extent of the mortgage debt, was by order of the District Court taken out of the estate and never was 'accounted for' by the administrator in such manner as to entitle him to commissions."

Again, in Estate of Simmons, 43 Cal. 543, at page 550, it is said: "The commissions to be allowed to an administrator are fixed by the statute. (Sec. 221.) They are a designated percentage *'upon the amount of the whole estate accounted for by him.'* We are of opinion that an administrator cannot be said to have 'accounted for' an estate, in the sense of the statute, unless he shall first have taken it into possession. He is charged by the statute, as we have already seen, with the value of 'the whole of the estate of the deceased which may come into his possession,' etc. (Sec. 216); and it is made his duty to 'take into his possession all the estate of the deceased, real and personal.' (Sec. 194.) When he shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value."

The foregoing citations of authority indicate that it has been the tendency of the courts of this state to compute commissions upon the gross estate taken into possession and accounted for by an executor, athough the general rule in some other states appears to be that where property subject to an encumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the encumbrance.

[1] In the instant case the executrix took the apartment house into her possession, collected the income derived therefrom and during the course of administration sold it at a price considerably in excess of the appraised value as shown in the inventory. In her first and final account and petition for distribution, said executrix made a full and complete accounting of her administration of the estate, not only of the rents received from the apartment house but also of the sale thereof. The fact that she did not actually tender the amount due on the trust deed to the trustee but sold the property subject thereto, the purchaser assuming and agreeing to pay the same under the terms of the order confirming said sale, is immaterial in so far as the question here under discussion is concerned. The property here offered for sale was owned in its entirety by decedent, regardless of the trust deed with which it was encumbered, and the executrix was entitled to receive her commissions based upon the value of the property, as of the date of the sale towit, $47,500. In other words, the proper basis for computation of said commissions was the gross value of the estate accounted for by her.

[2, 3] With respect to appellant's second point, it is established law that the amount and elements of expense of administration for services rendered to the estate by third persons rest in the sound discretion of the court, and in the absence of an abuse of such discretion, a disallowance of such items cannot be disturbed upon appeal. In re Moore's Estate, 72 Cal. 335, 13 P. 880; Estate of More, 121 Cal. 609, 54 P. 97. See, also, the opinion in Estate of Boggs, Cal.App., 90 P.2d 814, filed on May 24, 1939.

That portion of the judgment reducing from $150 to $60 the amount of compensation paid to the accountant is affirmed; that portion of the judgment reducing from $1,507.99 to $1,016.05 the statutory fee payable to appellant executrix and also to her attorney on account of services rendered to the said estate is reversed, and the court is directed to amend said judgment approving first and final account and petition for distribution in accordance with the views herein expressed.

We concur: DORAN, J; WHITE, J.

33 Cal.App.2d 609

## OLENDER et al. v. BURNSIDE et al.

**Civ. 2283.**

District Court of Appeal, Fourth District, California.

July 1, 1939.

**1. Appeal and error ⇨801(5)**

On motion to dismiss appeal, on ground that appeal is taken for delay only and is frivolous, Court of Appeals will not go beyond appellant's opening brief and papers used on the motion, and, if it is necessary in order to decide motion to examine entire record on appeal, the motion to dismiss will be denied.

**2. Appeal and error ⇨801(5)**

The respondents' motion to dismiss appeal, on ground that appeal was taken for delay only and was frivolous, and that the grounds of appeal presented in appellants' opening brief were unsubstantial, was denied, where to properly consider motion it would have been necessary for Court of Appeals to have examined entire record on appeal.

**3. Appeal and error ⇨808**

The respondents' motion to place case on the "Ready for Submission Docket" was denied, where respondents submitted no brief, and Court of Appeals desired assistance of a brief by respondents in considering merits of the appeal.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Suit by Julius Olender and others against Arthur G. Burnside and Myrtie Gray Burnside. From judgment for defendants the plaintiffs appeal. On respondents' motion to dismiss the appeal or place the case on the "Ready for Submission Docket."

Motion denied.

Claude L. Rowe, of Fresno, for appellants.

Robert M. Wash and G. L. Aynesworth, both of Fresno, for respondents.

MARKS, Justice.

This is a motion to dismiss the appeal or place the case on the "Ready for Submission Docket", on the ground that the appeal is taken for delay only and is frivolous, and that the grounds of appeal presented in appellants' opening brief are so unsubstantial as not to need further argument.

In the argument made in support of the motion there are frequent references to the transcript. We cannot decide the motion without examining the record on appeal.

[1] This court has announced and has firmly adhered to the policy that on such a motion as this we will not go beyond appellant's opening brief and the papers used on the motion; that if it is necessary, in order to decide the motion, to examine the entire record on appeal, the motion to dismiss will be denied. Rasmussen v. Fresno Traction Co., 11 Cal.App.2d 357, 53 P.2d 1038; Ure v. Maggio Bros. Co., 22 Cal.App.2d 536, 71 P.2d 598; Birkhofer v. Krumm, 24 Cal.App.2d 372, 75 P.2d 82; McNew v. Mulcahy, 24 Cal.App.2d 476, 75 P.2d 516.

[2, 3] In accordance with this policy, thus announced, the motion to dismiss in this case cannot be granted because, in order to properly consider it, we would have to examine the entire record on appeal. We also should have the assistance of a brief by respondents in considering the merits of the appeal.

The motion is denied.

I concur: BARNARD, P. J.

---

33 Cal.App.2d 528

## GRANT MEMORIAL PARK, Inc., v. ROBLA SCHOOL DIST. (MILLER et al., Interveners).

**Civ. 6216.**

District Court of Appeal, Third District, California.

June 27, 1939.

**1. Appeal and error ⇨761**

On appeal from judgment sustaining demurrer to complaint in intervention, statement, in appellant's brief, that problem for determination was whether complaint in intervention stated facts sufficient to constitute a cause of action, was not a compliance with court rule requiring statement of question involved on appeal. Rules for Supreme Court and District Courts of Appeal, rule 8, § 2.

**2. Appeal and error** ⚷761

The rule requiring a statement of the question involved on appeal may be disregarded when enforcement would result in injustice. Rules for Supreme Court and District Courts of Appeal, rule 8, § 2.

**3. Appeal and error** ⚷154(4)

An appellate court will not review a judgment at instance of a party who has formally consented to its rendition.

**4. Appeal and error** ⚷154(4)

The mere consent to the entry of judgment as a formal matter of procedure after an issue has been regularly determined against a party does not constitute such "acquiescence" as will deprive him of the right of appeal.

[Ed. Note.—For other definitions of "Acquiesce; Acquiescence," see Words & Phrases.]

**5. Appeal and error** ⚷154(4)

The recital in judgment dismissing complaint in intervention that judgment was entered on motion of the parties thereto did not establish that interveners had consented to entry of judgment and were hence precluded from appealing, in absence of conduct or declarations of interveners indicating intention to consent to rendition of such judgment.

**6. Covenants** ⚷79(3)

To create mutual equitable servitudes in the nature of restrictions in use of various subdivisions of a dominant tenement, enforceable by one who is not a direct party to the conveyance, the deeds must contain appropriate language clearly indicating that the restrictive covenant is for benefit of not only the dominant tenement but also of all other subdivisions thereof.

**7. Covenants** ⚷79(3)

Similar restrictive covenants in deeds to subdivisions of a dominant tenement will not create mutual equitable servitudes enforceable by one who is not a direct party to the conveyance if the deeds fail to refer to the dominant tenement or state that the agreement is pursuant to a plan for benefit of other designated portions of the tract.

**8. Covenants** ⚷49

Covenants creating mutual equitable servitudes should be strictly construed.

**9. Covenants** ⚷69(2)

A restrictive covenant in a deed to particularly described property does not run with the land or bind subdivisions of a tract which are not therein mentioned unless intention to apply the covenant to land other than that described in the deed is expressed in the instrument or in some other executed document of which the grantee has knowledge. Civ.Code, § 1468.

**10. Injunction** ⚷118(3)

A complaint by lot owner in subdivision to enjoin use of properties for cemetery purposes contrary to an alleged covenant running with the land was demurrable in absence of allegation of recital in deed that various portions of subdivided tract were to be affected by covenant in intervener's deed or that deed was executed for benefit of other lots than those therein described, notwithstanding allegation that restrictive covenant ran with the land and allegation that covenant was made for benefit of all lots in subdivision. Civ.Code, § 1468.

**11. Appeal and error** ⚷236(2)

Intervener, who did not apply to amend complaint in intervention after demurrer thereto was sustained without leave to amend, could not complain of failure to permit him to amend.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by the Grant Memorial Park, Incorporated, against the Robla School District, a duly organized school district of the County of Sacramento, State of California, to quiet title, wherein Thomas Miller appearing for himself and other property owners filed a complaint in intervention asking for declaratory relief and an injunction. From a judgment sustaining a demurrer to the complaint in intervention, without leave to amend, interveners appeal.

Affirmed.

Johnson & Curtright, P. H. Johnson, and C. K. Curtright, all of Sacramento, for appellants.

Ralph H. Lewis and Robert H. Schwab, both of Sacramento, for respondent Grant Memorial Park.

Otis D. Babcock, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, for respondent Robla School Dist.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellant, Thomas Miller, appeared for himself and other property owners of a subdivided tract and was permitted to file in this suit to quiet title a complaint in intervention asking for declaratory relief under section 1060 of the Code of Civil Procedure, and an injunction to prohibit the plaintiff and defendant from using their properties for cemetery purposes contrary to an alleged covenant running with the land. The intervener sought to restrict the plaintiff and defendant, for the benefit of the entire tract, to a decree quieting title to their lots *subject to the covenant* prohibiting its use for cemetery purposes. A demurrer to that complaint was filed on the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was sustained without leave to amend. No application to amend the pleading was requested. Judgment was thereupon rendered against the interveners. From that judgment this appeal was perfected.

The complaint alleges that plaintiff is the owner of lots 2, 15 and 16 of a subdivision of section 11 of Rancho Del Paso in Sacramento county to which lots it seeks to quiet title. The intervener alleges he is the owner of lot 46 of that same tract; that the deed by means of which he acquired title to his lot contains a covenant "running with the land", which prohibits the use of his lot for the purpose of maintaining or operating a cemetery or mausoleum thereon; that the defendant has "attempted to acquire" lots 2, 15 and 16 of that tract which are subject to the same covenant for the purpose of maintaining and operating a cemetery and mausoleum thereon; that the Sacramento Valley Colonization Company, a corporation, formerly owned the entire Rancho Del Paso, including the lots of both the plaintiff and the intervener; that said former owner in accordance with a general residential plan of subdivision agreed with all grantees, "by covenants running with the land and made a part of each and every deed conveying a lot or lots in said tract, that the lot or lots thereby conveyed should not be used for cemetery * * * purposes"; that all the lots which were thereafter conveyed contained a similar restrictive clause, and provided that in the event of a breach thereof the title should immediately revert "to the said Robla School District"; that the restrictive clauses in the various deeds of conveyances were "intended to be, and were expressly declared to be, covenants running with the land, and the same were made and entered into for the benefit of all the lots contained in said tract and for the benefit of all the respective owners thereof". While it is alleged the restrictions were *intended* "for the benefit of all the lots contained in said tract", that statement is a mere conclusion, for it is not asserted the declaration to that effect was contained in the deeds. The complaint fails to state what document or person "expressly declared" that the covenant was for the benefit of all lots of the tract. The complaint in intervention sets out neither the language of the covenants nor the deeds or contract in which the covenants are asserted to have been contained. We are therefore compelled to rely on the conclusions of the pleader in determining the effect and extent to which the restrictions are presumed to apply.

The respondent insists that the complaint in intervention fails to state facts sufficient to constitute a cause of action for the reason that the allegations of the pleading do not create a servitude upon the demised lots of the entire tract because the restricting covenant applies only to *grantees* thereof and does not mention the portion of the dominant tenement or other lots to which it is alleged to apply; that the appellant waived his right of appeal by consenting to the rendering of judgment against him, and that his statement of the question involved on appeal, which appears on the first page of the opening brief, does not comply with the requirements of rule VIII, section 2, of Rules for the Supreme Court and District Courts of Appeal.

[1, 2] The question printed on the first page of the appellants' opening brief gives no intimation of the real issue to be determined. It merely asserts that the problem for determination is whether the complaint in intervention states facts sufficient to constitute a cause of action. This is not a compliance with the evident purpose of rule VIII, section 2, of the Rules for the Supreme Court and the District Courts of Appeal. However, it has been held that courts may disregard that rule when its enforcement would result in injustice. Connell v. Higgins, 170 Cal. 541, 150 P. 769. We are disposed to waive the deficiency of

the printed statement of the question to be determined on appeal.

[3-5] Nor do we think the appellant waived his right of appeal by consenting to the entry of judgment against him. All that appears in the record to support the contention that the appellant consented to judgment against him is the formal recitation in the judgment that "on motion of *the parties hereto* and by reason of the law and the premises, it is ordered, adjudged and decreed", etc. In view of the fact that the intervener filed an amended pleading; that his attorney was present in court when the demurrer to his amended complaint was presented, and submitted the matter to the court for decision without making any concession, we assume the term "parties" as it appears in the judgment was inadvertently used and refers only to the parties to the action, other than the intervener. It is true that an appellate court will not review a judgment at the instance of a party who has formally consented to its rendition. Mecham v. McKay, 37 Cal. 154; Hood v. Verdugo Lumber Co., 219 Cal. 558, 27 P.2d 897; Adams v. Southern Pac. Co., 109 Cal.App. 728, 293 P. 681; People v. Aymar, 98 Cal.App. 1, 276 P. 595; 3 C.J. 671, § 546. Having submitted the demurrer to the court in good faith, and having promptly perfected his appeal from the judgment which was rendered, we assume he did not intend to concede that the judgment should be entered against him. Neither the conduct nor the declarations of the intervener indicate that he intended to consent to the rendering of judgment against him. The record refutes that theory. The mere consent to the entry of judgment as a formal matter of procedure after an issue has been regularly determined against a party to an action does not constitute such acquiescence as will deprive him of the right of appeal. It is said in 4 Corpus Juris Secundum, Appeal and Error, page 408, § 213c, in that regard: "Procurement or preparation of the mere formal entry of a judgment, order or decree in conformity with a previous finding or decision, is not such consent as will prevent an appeal therefrom."

Assuming, without so deciding, that under facts similar to those which the appellant has attempted to recite in the present action, he may be permitted to intervene under section 387 of the Code of Civil Procedure in an ordinary suit to quiet title to real property, we are, nevertheless, satisfied he has utterly failed to allege facts sufficient to constitute a cause of action.

It is true as the late Mr. Justice Olney said in the leading case of Werner v. Graham, 181 Cal. 174, at page 183, 183 P. 945, at page 949, that: "It is undoubted that, when the owner of a subdivided tract conveys the various parcels in the tract by deeds *containing appropriate language imposing restrictions on each parcel* as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. The agreement between the grantor and each grantee in such a case *as expressed in the instruments* between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels, and also that all other parcels shall be subject to such restrictions for its benefit."

[6-8] The court says in the foregoing paragraph that to create mutual equitable servitudes in the nature of restrictions in the use of various subdivisions of a dominant tenement, which are enforcible by one who is not a direct party to the conveyance, the deeds must contain appropriate language "expressed in the instruments" clearly indicating that the restrictive covenant is for the benefit of not only the dominant tenement but also of all the other subdivisions thereof. It is not enough that the several deeds contain similar restrictive covenants if they fail to refer to the dominant tenement or state that the agreement is pursuant to a plan for the benefit of other designated portions of the tract. The last cited case declares, 181 Cal. at page 181, 183 P. 945, that since such equitable servitudes are at variance with the recognized right of an owner of real property to enjoy the free and unrestricted use and control of his own land, such covenants should be strictly construed.

It will be observed that the complaint in intervention fails to quote the language of the covenants in question, and on the contrary the pleader merely purports to construe the meaning and application of the restrictions. It is true that the pleading does assert that the Sacramento Valley Colonization Company subdivided and conveyed to various purchasers portions of the Rancho Del Paso by deeds containing covenants that the land "should not be used for cemetery, burial ground or crematory purposes". But it neither alleges that the covenants declare they are intended for the benefit of other lots, nor that the restrictions are imposed in accordance with a subdivision plan to protect the tract against using the lots for cemetery purposes. In the absence of such direct allegations we must assume the deeds contained no such essential statements. For that reason the allegations of the complaint in intervention are fatally defective.

The complaint does recite that each deed declares that the restriction constitutes a "covenant running with the land". It is claimed that phrase is equivalent to the necessary declaration of an equitable servitude which is binding against all of the other lots of the tract. We think not. That statement is a mere conclusion which helps in no way to determine the extent or effect of the restrictions. There is no intimation in the deeds as to what lots or tract the covenant applies to beyond the land which is described in the particular deed. The mere use of that phrase is unavailing. Speaking of the ineffectual use of that very term, it is said in an article on the subject of Land Burdens in 10 Southern California Law Review, at page 283: "A reading of the cases leads one to believe that persons charged with the responsibility of preparing *proper documents for the creation of restrictions* have acted upon the supposition that all will be well if a clause is inserted reading: 'These covenants are to be considered as covenants running with the land.' One might venture the guess that this phrase has been used by attorneys in many cases without any particular understanding as to the meaning to be attached to the words. It is at least a legalistic expression, *and if no litigation results* it will fulfill the purpose intended."

Finally, in a futile effort to meet the essential requirements of the law, the complaint concludes by stating that the covenants "were made and entered into for the benefit of all the lots contained in said tract". But it will be observed this is also a mere conclusion of the pleader regarding his construction of the restrictive clauses. It is not alleged that the deeds so state, probably for the very good reason that declaration is lacking in the instruments.

The insufficiency of the allegations of the complaint in that regard is conclusively determined in the leading case of Werner v. Graham, supra. In that case one Mr. Marshall owned a tract of land which he subdivided into 132 lots, all of which he sold to various purchasers. He inserted covenants in each deed of conveyance specifically restricting the use of the demised lots to residential purposes, and prohibiting the maintenance of certain enterprises thereon. Like the present case, those deeds failed to refer to a general purpose of thereby benefiting the dominant tenement or portions of the tract other than the particular lots described in such deeds. In selling the various lots Mr. Marshall represented to all prospective purchasers that he required each buyer to agree to the same restrictive covenant. The plaintiff, Werner, sought to quiet title to his lot against the restrictions of the several deeds. Marshall was not a party to the suit. Judgment was rendered against the plaintiff, holding that his deed was subject to the covenant on the theory that the general plan of the owner created mutual equitable servitudes affecting all of the lots in the tract, although that fact was not stated in the deeds. On appeal that judgment was reversed. The court said: "The situation in this respect is that one, the owner of a tract of land, sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement. Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true the nature of the restrictions is such that, when considered in connection with the fact that Marshall still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. *But the grantee's intent in this respect is necessary, as well as the grantor's, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word to that effect, nor anything whatever which can* *be seized upon and given construction as an expression of such intent. If such was their intent, it has not been expressed.* Omitting, as we must, any consideration of what the understanding was between Marshall and his grantees, except as shown by the instruments between them, and construing the deed in the light of the fact that Marshall was at the time the owner of a large number of other lots in the tract, it may yet well be that the grantee intended to obligate himself only to Marshall, his heirs and assigns. Certainly that is all that is said. *It is also difficult to see how there can be any valid creation of what is practically a servitude, without some designation or description of what is an essential factor, namely, the dominant tenement.*"

In the case of Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P. 297, 298, a judgment determining that grantees of a portion of a larger tract took title subject to the covenant on the part of the grantor that they should enjoy the privilege in common of grazing their stock on the adjoining portion of the tract. On appeal the judgment was reversed. The late Mr. Justice Henshaw wrote the opinion. He said: "No writing evidenced this agreement. * * * That the agreement thus found may not for a moment be considered as a covenant running with the land is too plain to call for extended discussion. The obligation was not contained in a grant of an estate, nor in any other writing. * * * While attempting to impose a restriction upon the use of land, it is not created by deed, and, if it were, it does not by its language attempt to bind the assigns or grantees of the covenantor. While it is true that, in a proper case, equity will enforce against the covenantor's grantee a personal covenant imposing restrictions upon the use of land contained in the grant thereof (Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 68 P. 308; Cyc., p. 1078), yet equity will do so only in a proper case, and would certainly withhold its hand where such a restriction is not imposed by grant, but is sought to be created by parol. The same is true of the attempt to erect out of this agreement some servitude."

In the case of Miles v. Clark, 44 Cal. App. 539, 187 P. 167, 171, upon which the appellant relies, building restrictions were included in each of the deeds conveying various portions of a subdivided tract, with the express statement therein that the covenants were to apply to and bind "every lot in the tract for the benefit of every owner". Those covenants were properly upheld for the reason that they clearly expressed the essential elements of an equitable servitude. In that case every deed was accepted by the various grantees with a clear warning that not only his land but every other portion of the tract was affected by the burden imposed by the restrictive covenant. In the present case that essential element is lacking. In that regard the Miles case is distinguishable from this action. Regarding the sufficiency of the language contained in the reservations of the deeds in the Miles case the court says: "The contract and the five deeds above referred to each sets forth in numbered paragraphs the conditions and restrictions which constitute the building scheme for the tract, * * * after which *each instrument contains a clause expressly making the restrictive covenants binding upon every lot in the tract for the benefit of every owner.*"

In none of the cases that have been called to our attention has it been held that the doctrine of equitable servitudes may be imposed on portions of a subdivided tract or lots other than those which are described in the deeds of conveyance, in the absence of declarations in the instrument itself or in some other duly executed contract of which the grantees have knowledge, clearly expressing the purpose and intent of the servitude to be imposed and designating the land to be affected thereby.

An excellent discussion of this principle and an elaborate review of the authorities may be found in 10 Southern California Law Review, page 281.

Section 1468 of the Civil Code also infers that a covenant in a deed creating a servitude for the benefit of other land must be "expressed" in the instrument. That section reads: "A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, *which doing or refraining is expressed to be for the benefit of the land of the covenantee,* and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land."

[9] It follows that unless the intention of applying a restrictive covenant to land other than that which is described in the deed to particularly described property is

expressed in the instrument, or in some other executed document of which the grantee has knowledge, it may not be held the agreement, as a matter of law, "runs with the land", or that it is binding on the subdivisions of a tract which are not therein mentioned.

[10] For the reason that the complaint fails to allege that the various portions of the subdivided tract are to be affected by the covenant, or that it was executed for the benefit of other lots than those which are described in the deed, the pleading is fatally defective. The court, therefore, properly sustained the demurrer.

[11] The intervener may not complain of a failure to permit him to amend his pleading since that request was not made. Buckley v. Howe, 86 Cal. 596, 605, 25 P. 132; See v. Joughin, 18 Cal.App.2d 414, 420, 64 P.2d 149.

The judgment is affirmed.

We concur: PULLEN, P. J.; PAULSEN, Justice pro tem.

---

33 Cal.App.2d 523

## In re CLARK'S ESTATE.

## NORMAN v. EDWARDS.

Civ. 12171–S.

District Court of Appeal, Second District, Division 1, California.

June 27, 1939.

**1. Executors and administrators** 🔑111(1), 488.

The appointment, as executor, of the executor named in will, before a subsequent will was filed for probate, in absence of showing of bad faith of executor, was not void ab initio but was voidable only, being subject to revocation upon admission of the subsequent will to probate, and hence executor was entitled to commissions and attorney's fees. Probate Code, § 510.

**2. Executors and administrators** 🔑488

Where an executor or administrator resigns or is removed before complete administration, whether compensation shall be allowed and in what amount, within statutory limits, is generally a question of judicial discretion.

**3. Executors and administrators** 🔑111(6), 496(2)

Where letters testamentary were issued December 2, 1936, to executor who served as executor until March 11, 1937, when order admitting will to probate and directing issuance of letters testamentary to executor was vacated because of discovery of existence of a subsequent will, allowance of executor's commissions and attorney's fees in amount of $250 each was not abuse of discretion in absence of showing of bad faith by executor. Probate Code, § 510.

---

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Proceeding in the matter of the estate of Annette Norman Clark, deceased, wherein letters testamentary were issued to Mark H. Edwards. Subsequently an order was made vacating and annulling the order admitting will to probate and directing that letters testamentary issue to Mark H. Edwards, because of discovery of a subsequent will. Dale Norman qualified as administrator with the will annexed and proceeded to administer the estate pursuant to terms of the subsequent will. Mark H. Edwards filed his first and final account as executor, and petitioned for discharge, and the account was objected to by Dale Norman, administrator with the will annexed. From an order settling and approving the first and final account, the administrator with the will annexed appeals.

Affirmed.

Combs, Fritz & Murphine, of Los Angeles, for appellant.

Charles F. Blackstock, of Oxnard, for respondent.

YORK, Presiding Justice.

On December 2, 1936 the court made its order admitting to probate the purported last will and testament of Annette Norman Clark, deceased, dated November 15, 1935, and directed that letters testamentary issue to respondent Edwards, named therein as executor. At the time said order was made, there was in existence another will which was executed on October 8, 1936, by said decedent while she was in England and where her death thereafter occurred. On March 11, 1937, an order was duly made vacating and annulling said order of December 2, 1936, whereupon appellant qualified as administrator with the will annexed and proceeded to administer the estate, pursuant to the terms of the subsequent will. On November 22, 1937, the respondent filed his first and final account and petition for discharge, praying for approval thereof and for allowance of fees for his services rendered as executor under the first will, as well as compensation for his attorney. Appellant filed exceptions and objections to said account, particularly with reference to such allowance, alleging that respondent on December 2, 1936, stated to the court that the will of November 15, 1935, was the last will and testament of decedent, although said respondent had been informed by appellant that "there was in existence a will dated October 8th, 1936, and well knew of the existence thereof, and fraudulently and falsely represented to the Court that there was no later will and testament than that of November 15, 1935, and that thereupon and upon said representations the Court in the above entitled matter erroneously admitted to probate the will of November 15th, 1935."

After hearing the account and objections thereto, the court on March 29, 1938, entered its order settling and approving said first and final account, allowing respondent Edwards the sum of $250 for his services as executor, and also the sum of $250 as compensation for his attorney, together with $28.80 costs.

In appealing from this order the administrator with the will annexed contends "that an executor wrongfully appointed by a void order, under a revoked will, is not entitled to any commission for his services as executor, nor reimbursement for his court costs, nor to an allowance for payment to his attorney for his services", urging that "1. The original order appointing Mark H. Edwards was obtained in bad faith by virtue of misrepresentation to the court, and could not be the basis of a claim for fees and costs. 2. even if appointment was secured in good faith, a void order of appointment gives no grounds for recovery of anything other than actual costs in the case, being $28.80." As authority in support of his second point, appellant cites Estate of Frey, 52 Cal. 658.

The record discloses that on March 8, 1937, Judge Westwick denied a motion made by appellant to set aside Judge Henderson's order of December 2, 1936, admitting the first will to probate, after a hearing was had in which Judge Henderson appeared as a witness for appellant; that on March 11, 1937, the English will having been filed for probate, Judge Henderson upon his own motion annulled his order of December 2, 1936, on the ground of inadvertence and mistake. Appellant has repeatedly alleged bad faith on the part of respondent in offering the first will for probate, and although three judges have now passed upon some phase of the matter here involved, there is no finding that fraud was practiced upon Judge Henderson at the time the first order was entered. It would seem, therefore, "that the sole question now involved is whether or not the order of March 11, 1937, rendered the appointment of respondent executor void from the beginning", as aptly stated in the memorandum opinion written by Judge Drapeau in support of the order from which this appeal is taken, wherein he makes the following observations: "Edwards served as executor for a period from December 2, 1936, to March 11, 1937. I cannot believe that the order vacating and annulling the first order should be construed to make the appointment of Edwards void from the beginning. I believe the true rule to be that he held his office under the order of the Court; that his letters testamentary were voidable, being based on an erroneous order admitting an invalid will to probate; and that upon the first order being vacated by the second order, his office as executor then became vacant."

Section 510 of the Probate Code outlines the procedure to be followed upon the discovery of a subsequent will after probate of a pre-existing will: "Upon the admission to probate of a will after a grant of letters of administration on the ground of intestacy, or upon the admission to probate of a later will than the one before admitted to probate, the pre-existing grant of letters testamentary * * * must be revoked, and the administrator or executor whose grant of authority is thus terminated must render an account of his administration within such time as the court may direct."

The Estate of Frey, 52 Cal. 658, relied upon by appellant, is not in point. In that case the court held: "The letters testamentary issued to *Jacob* Frey were unauthorized and void, for the reason that the order directed the letters to be issued to the petitioner, *Joseph* Frey. The letters testamentary issued to *Jacob* Frey being void, he was not entitled to commissions, fees, or charges as an executor in the settlement of the estate of said testator." (Emphasis added.)

[1] In the instant case, respondent was named executor in the first will, and his appointment as such executor before the subsequent will was filed for probate, in the absence of a showing of bad faith on his part, was not void ab initio, but voidable only, being subject to revocation upon the admission to probate of the so-called English will. In re Owens' Estate, 32 Utah 469, 91 P. 283. In Estate of Hurst, 111 App.Div. 460, 97 N.Y.S. 697, the sole ground of appeal was the allowance of commissions to an administrator appointed in a case of supposed intestacy, who accounted to the executor under a will subsequently produced and probated. It was there held that since the administrator did not lay down his trust but was divested of it through probate of the will, and there was no reason to doubt that he acted in entire good faith, his administration was not a nullity but was with authority until the will was probated; citing in support Kittredge v. Folsom, 8 N.H. 98; Executor of Bigelow v. Bigelow's Adm'rs, 4 Ohio 138, 19 Am.Dec. 591; Schouler on Executors, 3d Ed., sec. 160; 11 Am. & Eng.Ency.Law, 2d Ed., p. 1287, wherein it is stated: "The fact that the authority of an executor has been terminated by the revocation of his letters or of the probate of the will does not affect his right to compensation for services previously rendered while acting in good faith."

[2] Where an executor or administrator resigns, or is removed before complete administration, it is generally a question of judicial discretion as to whether compensation shall be allowed, and in what amount within statutory limits. 94 A.L.R. 1102.

In Ord v. Little, 3 Cal. 287, 289, it was held: "Where, therefore, an administrator resigns, or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has rendered. In such a case it is the duty of the Probate Court to examine into the nature and value of the services rendered, and comparing, as well as possible, that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment." See, also, Estate of Piercy, 168 Cal. 750, 754, 145 P. 88; Estate of Jones, 166 Cal. 147, 152, 135 P. 293.

[3] Under the facts presented herein, it cannot be said that the court abused its discretion when it allowed executor's commissions and attorney's fees in the amount of $250 each.

For the foregoing reasons, the order or decree appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

---

33 Cal.App.2d 1

## PEOPLE v. SILVERMAN.

Cr. 3162.

District Court of Appeal, Second District, Division 2, California.
May 22, 1939.

**1. False pretenses** 🔑**49(1)**

Evidence sustained conviction of issuing a check without sufficient funds.

**2. False pretenses** 🔑**6**

Where defendant wrote "draft" on one corner of check drawn on bank and purported to insert name of certain person in space designated for branch of bank, defendant could not avoid criminal responsibility for issuing a worthless check on theory that instrument was a draft and had not been presented to drawee when there appeared to be no person or branch of bank bearing the inserted name.

**3. Indictment and Information** 🔑**171**

If information charges offense in such manner that defendant is apprised of the act with which he is charged, with sufficient certainty to enable him to make a defense thereto, and if he is not misled by any statement contained in information, and transaction is so identified that defendant by proper plea may protect himself against another prosecution for same offense, allegations are sufficient as against claim of variance. Pen.Code, § 956.

**4. Larceny** ⚿40(9)

A conviction of theft may be upheld notwithstanding that information states an erroneous name as owner of stolen property.

**5. False pretenses** ⚿38

Where information charged that defendant issued worthless check with intent to cheat and defraud a certain person and a bank, proof that check was cashed at a hotel was not a fatal variance, where cashier at hotel was person named in information as one whom defendant intended to cheat and defraud, and transaction was set forth in such manner as to sufficiently inform defendant of charges to enable him to present any defense and by proper plea defend himself from subsequent prosecution for same offense. Pen.Code, § 956.

**6. Criminal law** ⚿982

The matter of granting probation in the first instance is within sound discretion of trial court.

**7. Criminal law** ⚿982

Discretion of trial court to revoke an order of probation is very broad. Pen.Code, § 1203.2.

**8. Criminal law** ⚿982

Trial court may make an order revoking probation based upon facts presented in informal charge from which trial court has reason to believe that defendant has violated his probation, or is unfit to be at large. Pen.Code, § 1203.2.

**9. Criminal law** ⚿982

Order revoking probation was proper where defendant failed to comply with order requiring him to make restitution to a hotel to which defendant had issued a worthless check and had disobeyed order of probation officer and remained out of jurisdiction of court without permission. Pen. Code, § 1203.2.

---

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Max Silverman was convicted of issuing a check without sufficient funds, and he appeals from a judgment revoking probation. Affirmed.

Max Silverman, in pro per.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was convicted at a trial by the court without a jury of the crime of issuing a check without sufficient funds. Proceedings were suspended and he was placed on probation on November 27, 1934, for a period of five years. Probation was revoked on July 19, 1938, and defendant was sentenced to the state penitentiary for the term prescribed by law. From this judgment he prosecutes this appeal.

Defendant contends that the evidence is insufficient to sustain the conviction. From the evidence introduced by the prosecution it appears that defendant was on and before October 28, 1933, staying at the Ambassador Hotel in Los Angeles and had incurred a large bill at the hotel. On the date mentioned he presented a check for the sum of $4,944.15 and received from the cashier of the hotel the sum of $1,500 in cash, the difference being applied on defendant's bill at the hotel. The check, drawn on National Newark & Essex Bank of Newark, New Jersey, in favor of the Ambassador Hotel was signed by the defendant. On the printed check form after the words Name of bank, appears in ink the name of the bank on which the check was drawn. Under the words, Name of bank, appears the printed word, Branch, and after the word, Branch, appears in parenthesis and in ink the words, Peter Baida. The check was forwarded to the payee bank by one of the Los Angeles banks and was returned marked "no account either party". The deposition of Emil Peter Barbata was received in evidence in which it appears that the deponent was a teller at the payee bank named in the check. He testified that no arrangement for credit had been made by defendant with the payee bank and that defendant did not have sufficient funds or credit with the bank to cover the amount of the check; that there was no account in the name of the defendant at the bank. The deponent further testified that a brother of the defendant had left with him personally sufficient funds to cover the amount of the check. These funds were later exhausted.

[1, 2] We are satisfied that the evidence is sufficient to sustain the conviction. Defendant unquestionably wrote a check

drawn on a bank in which he had no funds or credit and received therefor cash from the hotel. Defendant argues that since he wrote the word draft on one corner of the instrument and inserted the words Peter Baida, in the space designated for the branch of the bank, the instrument must be considered to be a draft and that it was not presented to the drawee. It is of little consequence whether the instrument be called a draft or a check for the code section covers both checks and drafts. The check was drawn on the bank and not on any individual. Indeed, it appears that there is no such individual as Peter Baida and no branch of the bank bearing that name. It is to be noted that the witness Barbata testified that he had known defendant for several years and had had various business transactions with him, but regardless of these circumstances the defendant did not write the true name Barbata on the check, but instead wrote the word Peter Baida in the space on the check form on which directions were printed to insert the name of the branch.

[3-5] In the information it is charged that defendant issued the check with intent to cheat and defraud C. C. Smith and National Newark & Essex Bank. Defendant now contends that there is a variance between the charge and the proof in that the check was cashed by the Ambassador Hotel and therefore the hotel company must be the party defrauded. C. C. Smith was the cashier at the hotel. Section 956 of the Penal Code is as follows: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission, is not material." If the information charges the offense in such manner that the defendant is apprised of the act with which he is charged with sufficient certainty to enable him to make a defense thereto, if he is not misled by any statement contained in the information, and the transaction is so identified that the defendant, by a proper plea, may protect himself against another prosecution for the same offense, it must be held that the allegations are sufficient to sustain the conviction when an attack is made upon the ground of variance. It has been frequently held that convictions may be upheld notwithstanding the informations stated erroneous names as owners of stolen property. People v. Cloud, 100 Cal.App. 792, 281 P. 79; People v. Leong Quong, 60 Cal. 107; People v. Nunley, 142 Cal. 105, 75 P. 676; People v. Larrabee, 113 Cal.App. 745, 299 P. 85. The circumstances of the transaction which is the subject of this action are set forth in such manner that defendant was undoubtedly sufficiently informed of the charges to enable him to present any defense that he might have; and there is no question but that defendant can by a proper plea defend himself from a subsequent prosecution for the same offense if occasion should arise.

Defendant contends that the court was without authority to revoke the probation which had been granted to him, basing his contention upon the fact that the court ordered him to make restitution of $4,944.15 to the Ambassador Hotel and of $150 to the county treasurer, the costs of extradition, without specifying when during the period of five years payment should be made. Although the court in granting probation authorized the probation officer to determine the amounts and times of the instalments the court specifically stated: "I think something ought to be done by him and through some of his friends and his own activity within the next 90 days. It will be small comparatively speaking, but we want some evidence of good faith on his part." No payment was made by defendant within the period of 90 days but, on the contrary, defendant disobeyed the order of his probation officer and remained out of the jurisdiction of the court without permission. It was necessary to send an officer to the East for the purpose of apprehending defendant and bringing him within the jurisdiction of the court after he had been placed on probation.

[6-9] The matter of granting probation in the first place is within the sound discretion of the trial court. It has been referred to as "an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted". People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16, 17. In section 1203 of the Penal Code (now section 1203.2) it is provided that the court is authorized to revoke an order for probation if there is reason to believe from the report of the probation officer, or otherwise that the defendant had violated the terms of his

probation. The discretion of the court to revoke an order of probation is "very broad". People v. Fields, 131 Cal.App. 56, 20 P.2d 988. No formal procedure is provided for presenting charges of violation of probation. The court may make an order revoking probation based upon facts presented in an informal charge from which the court has reason to believe that the defendant has violated his probation or is unfit to be at large. In re Young, 121 Cal.App. 711, 10 P.2d 154. We see no occasion for disturbing the order of the court.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

---

33 Cal.App.2d 538

## PEOPLE v. KING.

Cr. 1684.

District Court of Appeal, Third District, California.

June 27, 1939.

**1. Criminal law 🔑511(7)**

In burglary prosecution, testimony of accomplice corroborated by admission of defendant that they took wool missing from warehouse sufficiently established corpus delicti to warrant conviction.

**2. Criminal law 🔑406(1)**

In burglary prosecution, statement made by defendant to district attorney and sheriff prior to trial was properly admitted to connect defendant with the commission of the offense.

**3. Criminal law 🔑511(7)**

In burglary prosecution, testimony of accomplice was sufficiently corroborated by testimony that the alleged stolen wool was missing from warehouse and by admission of defendant himself to sustain conviction.

**4. Criminal law 🔑511(3)**

Corroboration of testimony of an accomplice may be circumstantial or gained from the defendant's admission, statement, testimony, or conduct as a witness.

**5. Burglary 🔑41(3)**

Evidence that men went to warehouse before daylight, that they turned off automobile lights and drove to unlighted door to which one of the men had a key, together with admissions of defendant, sustained conviction of burglary of the second degree on finding that defendant entered warehouse with a criminal intent.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Kenneth King was convicted of burglary of the second degree, and he appeals.

Affirmed.

Edmund M. Moor, of Corning, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this case the appellant was convicted by the court, sitting without a jury, of burglary of the second degree.

The defendant was convicted of stealing wool from the De Pue warehouse at Tehama. Some time prior thereto, King and one Tindall had been engaged in a transaction or two where farm products had been purchased in and around Corning, and then taken by Tindall in his pickup truck to nearby points, and there sold, and the profits, if any, divided between the two.

The day prior to the events hereinafter related, Tindall and a man named Crawford met defendant, and after driving about the city of Redding, the three retired to the room of defendant to sleep. It had been previously arranged that they would pick up certain wool in a warehouse near Tehama and take it to Sacramento, where it was to be sold, and return the same day. For that reason, the defendant stated, they all stayed in his room so they could get an early start because he had an alarm clock.

On the morning in question they left the hotel a little before daylight and proceeded to the warehouse, defendant driving the pickup truck which belonged to Tindall. It was then not quite daylight. The headlights of the car were extinguished as they drove up before one of the unlighted warehouse doors. Tindall, who had recently suffered a broken arm, which he still carried in a cast, opened the door with a key he had, and preceded the other two men into the warehouse. There, after examining certain bags of wool, he designated three particular bags, which the defendant and Crawford loaded into the truck. Tindall, in answer to a question by King, stated that some one owed the wool to him for shearing. On the way to Sacramento they had a flat tire, and while they were fixing the tire Tindall stated to King: "If anything is said about this wool, it is my wool, and I will make it right with you boys."

Upon reaching Sacramento, they proceeded to the receiving platform of the Pacific Fur & Wool Company, where Tindall gave the defendant and Crawford a dollar to get something to eat, and they left, leaving Tindall to close the deal with the wool company. A short time later he joined them in a nearby saloon, having in his possession a check. They then went to a bank where the check was cashed and Tindall gave the defendant and Crawford each $27 as the proceeds of the sale, saying as he did so: "Well, here is yours." Apparently while in Sacramento, the three men consumed considerable liquor, and on the return trip the defendant and Crawford got into an argument, and while they were stopped at a service station near Roseville, Crawford, who was then operating the truck, drove away, leaving the defendant in Roseville. He (defendant) returned to Redding the next day, but from that time on had no further contact or dealings with either of his two companions. A short time thereafter the shortage of the wool was discovered and Tindall and Crawford were arrested and pleaded guilty to burglary.

[1] Four points are urged by appellant for reversal. The first point is that the prosecution failed to prove the corpus delicti. In this connection it was established that the wool taken belonged to Holmes & Wing. Mr. Wing testified they knew how many sacks were in the warehouse and knew how many were checked out when the wool was sold, and there were fourteen sacks short. The defendant admits that they took three sacks of wool from the warehouse, and Crawford testified to the same effect. Defendant does not claim he had any authority to move the wool from the warehouse. This, we think, is sufficient to establish the corpus delicti. The testimony of the accomplice Crawford was sufficient to prove the corpus delicti, and when corroborated by the admission or confession of the defendant, warrants a verdict of conviction. People v. Snyder, 74 Cal.App. 138, 239 P. 705.

[2] It is next urged that it was error to admit the statement of defendant made to the district attorney and sheriff prior to the trial. The principal objection to the admission of this statement was the contention by appellant that the corpus delicti had not been established, and that the admissions of the defendant could not be used as an aid in proving the crime. The statement of defendant, however, was not used to establish the crime, but was admitted for the purpose of connecting the defendant with the commission of the offense. Appellant also argues that the statement was used by the prosecution to establish the element of intent. The question of intent, however, is determined from all the circumstances connected with the offense. Such intent could be gathered from the testimony of Crawford. Also, the fact of the meeting of the three men on the previous evening, their leaving together before daylight, and their approach to the warehouse, turning off the lights and driving to an unlighted doorway, the entry, the manner of the selection of the particular sacks by Tindall, his excuse that somebody owed him money for shearing, are all circumstances from which the court could determine that the entry by defendant was with a criminal intent.

Defendant was asked if he had not stated in answer to the question put to him at the time his statement was taken: "Q. Knowing that this was hot wool, weren't you a little bit afraid to go in there particularly in broad daylight and get it?" And he answered, "Well, yes, I didn't feel comfortable about it. Q. What is your explanation of that? A. Well, I just, I just began to wonder where this here wool was coming from. * * *"

The third point urged by appellant is that the court erred in denying his motion to dismiss count one of the information at the close of the state's case. At that time, upon motion, the court dismissed counts two and three of the information. These two counts charged burglary with intent to receive stolen property, a felony. Count one charged burglary with intent to steal.

[3, 4] Upon the motion to dismiss count one, appellant claimed that this count was

not established as there was insufficient corroboration of the testimony of the accomplice Crawford. However, the testimony of Crawford is amply corroborated by the witness Wing, and the admissions of defendant himself. Such corroboration may be circumstantial or gained from the defendant's admissions, statements, testimony or conduct as a witness. As the court said in People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611, 614: "Furthermore, evidence showing a consciousness of guilt * * * may serve as a requisite corroborative circumstance * * *."

[5] It was finally urged by appellant that the evidence is insufficient to support the judgment. We cannot repeat all the evidence introduced connecting defendant with the offense, but among other things, he was asked:

"Q. What do you mean by saying you didn't feel comfortable about it (entering the warehouse)? A. I was wondering whose wool and how he come in contact with,—how it was under his thumb.

"Q. As a matter of fact, you knew or suspected at that time, did you not, that the wool was hot? A. I didn't consider it that way. I was wondering how he come in control of the wool and the key to the warehouse.

"Q. In other words you were suspicious of him at that time? A. Slightly, yes."

Further, the defendant stated:

"A. * * * I just thought if he had a key to this and had a key to that, he must make them, see.

"Q. That made you suspicious of him, didn't it? A. Yes, when I found out that he had a key."

Furthermore, when asked about the arrangements for going to Sacramento and the acceptance of the $27 as his share of the proceeds from the sale of the wool, he was asked: "Q. In other words, you didn't expect any compensation from making this trip to Sacramento? A. It wasn't discussed."

From all of the foregoing facts, the court very properly, both from the testimony and from the circumstances, found that the defendant entered with a criminal intent.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

---

33 Cal.App.2d 745

## COLE v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 6152.

District Court of Appeal, Third District, California.

June 27, 1939.

**Officers** ⚷72(1)

Highway maintenance foreman in division of highways, department of public works, who, prior to expiration of probationary term, had received notice attempting to dismiss him from department, *held* entitled to reinstatement under the facts relating to notice of dismissal.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Mandamus proceeding by R. E. Cole, petitioner, against the State Personnel Board of the State of California and others to compel reinstatement of petitioner to position in division of highways, department of public works. From a judgment denying the writ, petitioner appeals.

Reversed and petitioner reinstated.

Albert Sheets and Anthony J. Kennedy, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

PER CURIAM.

This is an appeal from a judgment denying to petitioner herein a writ of mandate against the State Personnel Board et al. to compel the reinstatement of petitioner to his position in the division of highways, department of public works.

Prior to the expiration of the probationary term of petitioner he received a notice attempting to dismiss him from the department. The facts in regard to the notice of dismissal are similar to the procedure used in the attempt to terminate the employment of Frank Kelly, discussed in the case of Kelly v. State Personnel Board, Cal.App., 88 P.2d 264.

For the reasons therein stated, the judgment herein is reversed, and the petitioner reinstated to the position held by him as highway maintenance foreman of district six in the division of highways, department of Public Works.

Let the peremptory writ of mandate issue by the trial court, as prayed for.

14 Cal.2d 34

## In re ROTHROCK (two cases).
## PEOPLE v. ROTHROCK.

Cr. 4200, 4201, 4046.

Supreme Court of California.

July 12, 1939.

**1. Audita querela** ⟹1
**Criminal law** ⟹997, 998, 1011, 1193
**Habeas corpus** ⟹3
**Witnesses** ⟹16

Where petitioner who had been convicted on two counts of attempted murder and a third count of assault with deadly weapon petitioned Supreme Court for writ of coram nobis, writ of audita querela, writ of habeas corpus, writ of certiorari, recall of remittitur, revocation and annulment of judgment, subpœna duces tecum, production of documents, permission to appear and testify, and other and further relief, because of uncertainty as to his remedy, and a full measure of relief could be accorded petitioner on his motion to recall the remittitur, the other motions and petitions were denied.

**2. Criminal law** ⟹1193

A mistake of fact on the part of an appellate court which results in prejudicial error or a miscarriage of justice affords a proper ground for recall and correction of the remittitur.

**3. Criminal law** ⟹1193

The recall of a remittitur by an appellate court is upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order, and not upon the principle of resumption of jurisdiction.

**4. Motions** ⟹46

In contemplation of law, a court order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity.

**5. Criminal law** ⟹1193

A remittitur by an appellate court will be recalled only when inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision.

**6. Criminal law** ⟹1193

An application to recall remittitur remanding case with direction to enter judgment convicting applicant of attempted murder and assault with deadly weapon would be granted, where Supreme Court issued remittitur under mistaken belief that counsel for applicant had failed to move trial court for a new trial, and applicant was entitled to new trial as matter of right under statute upon failure of trial court to pass upon his motion within time provided. Pen. Code, §§ 1191, 1202.

**7. Criminal law** ⟹946

A waiver by a defendant of his right to a trial by jury does not constitute a waiver of his right to move for a new trial.

---

In Bank.

Consolidated proceedings in the matter of the application of Donald A. Rothrock, who was convicted on two counts of attempted murder, and a third count of assault with a deadly weapon, for a writ of audita querela, writ of coram nobis, writ of habeas corpus, writ of certiorari, recall of remittitur, revocation and annulment of judgment, subpoena duces tecum, production of documents, permission to appear and testify, and other and further relief.

The motion to recall the remittitur granted, and all other motions and petitions denied.

Nos. 4200 and 4201.

Donald A. Rothrock in pro. per. (Josiah Coombs and Peggy Halloran, both of Los Angeles, and J. M. Frame, of Reno, Nev., of counsel), for Rothrock.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

No. 4046:

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

Donald A. Rothrock, in pro. per., Kirtland I. Perky, of Los Angeles, Roscoe D. Jones and P. Q. Rothrock, both of Oakland (Frank S. Hutton, James E. Fenton, Peggy Halloran, and Josiah Coombs, all of Los Angeles, and J. M. Frame, of Reno, Nev., of counsel), for respondent.

PER CURIAM.

By this consolidated proceeding, the applicant, Donald A. Rothrock, has moved and petitioned this court for writ of coram nobis, writ of audita querela, writ of habeas corpus, writ of certiorari, recall of remittitur, revocation and annulment of judgment, subpoena duces tecum, production of documents, permission to appear and testify, and other and further relief. Uncertain of his remedy, petitioner has couched his plea in these various forms, but the allegations in each instance are identical, and the prayer in substance is that, regardless of form, he be given the relief to which the facts entitle him.

[1] The relief sought, and the full measure thereof, may be accorded petitioner on his motion to recall the remittitur. This is the form of remedy available for correction of the type of error of which he complains. No greater scope of relief can be procured by means of his various other motions and petitions, and they must therefore be denied. The proceeding, in the discussion which follows will be treated as a motion to recall the remittitur.

The history of this cause is related in prior decisions. People v. Rothrock, 8 Cal.2d 21, 63 P.2d 807; People v. Rothrock, 21 Cal.App.2d 116, 68 P.2d 364. On January 22, 1936, after a trial by the court on the merits, jury being waived, petitioner was found guilty on two counts charging attempted murder, and a third count charging assault with a deadly weapon. His counsel immediately interposed an oral motion for a new trial. On January 31st, the date fixed for hearing that motion, petitioner in propria persona filed "Objections to Fatally Defective Verdict", and there was also a substitution of attorneys. On February 1st petitioner's new counsel filed a written notice of intention to move for a new trial, probably in ignorance of the fact that an oral motion had already been made. The objections and the motion, after continuances, were finally set for hearing on March 6th. On that day, at a session held hurriedly before giving way to another trial, counsel presented his argument upon the objections to the verdict and expressed his readiness to argue the motion for new trial. Time would not permit of the latter argument, and the question of continuance was discussed. The court stated that it was his purpose to grant the motion for new trial, if counsel would submit it. Counsel, however, objected to arguing it before hearing the court's ruling on the objections to verdict, or to submitting it without argument. The court finally concluded the prolonged colloquy with the statement: "We will just obviate all that; the so-called objection to the verdict of the court is sustained; the proceedings at the trial are vacated, and the defendant is remanded to the Master Calendar Department for re-pleading."

From this order an appeal was taken by the People, with the result that upon hearing by this court the order was "reversed and the cause remanded to the trial court with instructions to enter judgment in accordance with the finding of the court." People v. Rothrock, 8 Cal.2d 21, 63 P.2d 807, 809. The direction to enter judgment of conviction was predicated upon the mistaken belief, expressed in the opinion, that no motion for new trial had been made. Pursuant to the mandate of the remittitur embodying the erroneous direction, the trial court entered judgment, and petitioner appealed therefrom. On appeal the judgment was affirmed. People v. Rothrock, 21 Cal.App.2d 116, 68 P.2d 364.

By the present proceeding no attack is made upon the decision of this court or the remittitur thereafter issued, in so far as reversal of the order sustaining objections to the verdict is concerned. The adjudication that that order was wrongful and erroneous is unassailable. But petitioner does challenge that portion of the decree and the remittitur which remanded the cause with instructions to the trial court to enter judgment of conviction. He contends that the cause should have been remanded for a new trial, and from the failure to so direct a miscarriage of justice has resulted. He urged, when the cause was before this court, that because the trial court had not passed upon his motion for new trial within the time provided in section 1191 of the Penal Code, he had become of right entitled to a new trial under section 1202 of said code. He made the same argument at the hearing had on return of the remittitur to the trial court; he demanded and moved for new trial, for arrest of judgment, or for alternative relief. That court, however, announced that it considered the mandate of the remittitur of this court to be binding upon it, and that it was thereby precluded from taking any action other than to enter judgment as directed. After entry of the judgment and upon the appeal therefrom on the merits, petitioner again asserted his right to a new trial, but the District Court of Appeal refused to consider the point on the ground that it had theretofore been determined by this court, 21 Cal.App.2d 116, 68 P.2d 364. Petitioner next sought relief through an application for writ of habeas corpus (Crim. No. 4187) which was denied.[1] Thereafter he instituted the present proceeding, wherein he has moved that this court recall and correct its remittitur. It is apparent that he has been vigilant in urging his claim.

The ground of the motion to recall the remittitur is that the judgment of this court was improvidently granted under a mistake of fact, a mistaken belief that no motion for new trial had ever been made, whereas the fact of the matter is, as above stated, that at the close of the trial, immediately after the court announced its finding of guilt, petitioner's then counsel moved orally for a new trial. His request is reported at page 321 of the Reporter's Transcript as follows: "If your Honor please, at this time I interpose a motion for a new trial upon all the statutory grounds and request that the time of passing judgment be deferred."

That this court was unaware of the making of the motion at the time it rendered its decision (8 Cal.2d 21, 63 P.2d 807, 808) is shown by its discussion of petitioner's contention that he was of right entitled to a new trial. The opinion states: "But this argument proceeds upon a false premise. There was in fact no motion made for a new trial, the notice of motion is not the motion itself and is not sufficient to require the court to pass upon it. * * * In this case the defendant not only made no motion but declined and refused to submit the motion. * * *" Again, in setting forth the facts of the case, it is said: "However, on the day when the objections were to be heard and the motion for new trial made, the defendant refused to submit or make the motion for a new trial, but insisted that the court rule upon his objections to the verdict."

The remarks quoted explain the manner in which this court was misled. The written notice of motion which was filed by new counsel, after interposition of the oral motion by former counsel, is the document referred to in the statement of the opinion that "the notice of motion is not the motion itself". The change of counsel, the filing of the written notice without reference to the prior oral motion, and the later refusal to argue and submit the motion prior to ruling on the objections to the verdict all tended to confuse the record, and easily led the reader of the transcript to conclude that no motion had actually been made. But for the oversight, this court would undoubtedly have held that petitioner was entitled to a new trial, and would have remanded the cause therefor. There is no doubt that petitioner suffered prejudice by the error. The trial court considered that he had good ground for a new trial, and expressed his intention to grant the motion therefor when counsel submitted it. Had not the attempt been made to reach the same end by sustaining objections to the verdict, petitioner would probably have had his new trial.

[2-4] A mistake of fact on the part of an appellate court which results in prejudicial error or a miscarriage of justice affords a proper ground for recall and correction of the remittitur. This is well settled. Exceptions to the general rule that an appellate court loses all control and jurisdiction over a cause after the remittitur has been issued by its order and filed in the court below, were declared in this state in 1864, in the case of Rowland v. Kreyenhagen, 24 Cal. 52. It was there said: "* * * This general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the Court or the opposite party; for if it appears that such has been the case, the appellate Court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this Court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the Court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the Court below, yet in law they are considered as still pending in the appellate Court, and that Court may take

---

[1] No opinion.

such steps as may be necessary to make the fact and law agree." This doctrine is quoted with approval in Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008, and Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006.

[5] In a note in 23 California Law Review at page 354, which digests numerous authorities on the subject, the following conclusion is expressed: "It would appear from these cases that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision."

In State v. Ramirez, 34 Idaho 623, 203 P. 279, 280, 29 A.L.R. 297, a criminal case wherein the defendant had been convicted of murder and his punishment had been fixed by the jury at death, the supreme court of the state of Idaho had under consideration the question of its power to recall a remittitur. The ground urged in support of the motion to recall was "that counsel failed to fully brief and argue the question of the power of this court to modify the judgment by reducing the penalty to life imprisonment, and that this court was led into error by reason of a suggestion that it was without such power". After reviewing authorities from many jurisdictions, and quoting the doctrine of Rowland v. Kreyenhagen, supra, as being in conformity with the preponderance of judicial authority, the court concluded that a proper case for the exercise of its power to recall and correct its mandate was presented, saying: "This court, upon respondent's suggestion, assumed, although it did not decide, that it had no power to reduce the penalty fixed by the jury. We do not mean to be understood as inferring that fraud or imposition was practiced upon this court by either of the parties connected with the cause, but if the court fell into error it was by reason of the fact that counsel failed to properly brief and present the question now under consideration. The questions involved here are of the utmost importance to appellant, and every consideration of justice demands that this court determine its power both to recall the remittitur and to reduce the punishment in this case, and that the punishment be reduced if the facts do not warrant the imposition of the death penalty. While the circumstances of this case do not require the adoption of so broad a rule as is followed in New York or Oklahoma, yet there is ample authority to justify us in holding that this court retains jurisdiction of an appeal, during the term at which a judgment is rendered, where such judgment was inadvertently given, in consequence of a false suggestion * * *." See, also, Municipal Bond Co. v. City of Riverside, 138 Cal.App. 267, 32 P.2d 661; Haydel v. Morton, 28 Cal.App.2d 383, 82 P.2d 623; 2 Cal.Jur., p. 1068, sec. 634; note 84 A.L.R. 579, 591, et seq.; 3 Am. Jur., p. 754, par. 1264; 5 Cor.Jur. Secundum, Appeal and Error, p. 1561, sec. 1996.

[6] From the foregoing discussion it follows that if, at the time the cause was before this court on appeal from the order sustaining objections to the verdict, petitioner was correct in his contention that he was entitled to a new trial, the remittitur should now be recalled and corrected to accord him this right.

[7] Upon that appeal it was urged by the People that a defendant may not move for a new trial in a felony case tried by the court without a jury. We cannot subscribe to the view that a waiver by a defendant of his right to a trial by jury constitutes a waiver of his right to move for a new trial. Where a jury is waived, the finding of the court is substituted for the jury verdict, but this substitution does not affect the applicability of the code provisions prescribing the procedure for new trial. So, in the present case, the motion for new trial was duly made; the court did not pass thereon within the time provided by section 1191 of the Penal Code; petitioner, having been prejudiced by the failure to have the motion determined, is now entitled to a new trial under section 1202 of said code.

All motions and petitions presented in this proceeding, other than the motion to recall the remittitur, are denied. The motion to recall the remittitur is granted. The remittitur heretofore issued on January 18, 1937, is recalled. There is stricken therefrom the order that the cause be "remanded to the trial court with instructions to enter judgment in accordance with the finding of the court", and for the words so stricken the following are substituted: "remanded to the trial court for a new trial".

14 Cal.2d 30

## PEOPLE v. LARISCY et al.

Crim. No. 4208.

Supreme Court of California.

July 12, 1939.

1. **Homicide** ⚷253(1)

Evidence *held* sufficient to sustain convictions of first-degree murder.

2. **Robbery** ⚷24(1)

Evidence *held* sufficient to support convictions of first-degree robbery and attempted robbery.

3. **Criminal law** ⚷665(1)

Denial of defendants' motion to exclude witnesses from courtroom during other witnesses' testimony for lack of sufficient showing of necessity was discretionary.

4. **Criminal law** ⚷656(4)

In murder and robbery trial, trial court's statement that state's witness testified that man with one of defendants resembled codefendant very much, but seemed heavier, was not error as misquoting testimony, where such witness actually testified that such man resembled codefendant very much, except that he was heavier.

5. **Criminal law** ⚷655(5)

The trial court's observations that he did not see materiality of question asked witness by defendants' counsel and that it seemed to be directed to criticism of officers was not misconduct as unjust criticism of such counsel.

6. **Criminal law** ⚷787(1)

A proffered instruction that defendants did not have to take witness stand was properly refused as irrelevant and confusing, where they did take stand.

7. **Criminal law** ⚷829(22)

Refusal of instruction that, if both defendants were found guilty, it was not necessary that each suffer same penalty, was not error, where jury was properly instructed that each defendant could be convicted or acquitted on any of several charges and that determination of penalty was entirely for jury.

8. **Criminal law** ⚷938(1)

Denial of defendants' motion for new trial on ground of newly discovered evidence of affiant, whose testimony at hearing on motion was simply contradictory of other witnesses' testimony at trial and found unworthy of credence by trial court, was not abuse of discretion.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joseph Lariscy and Lyle Woollomes were convicted of murder in the first degree, robbery in the first degree, and attempted robbery, and from such convictions and an order denying their motion for new trial, they appeal.

Judgments and order affirmed, and appellants' petition for leave to produce additional evidence denied.

Joe Orloff and Paul Pearlin, both of Los Angeles, for appellant Lyle Woollomes.

Carl W. Minton, of Los Angeles, for appellant Joseph Lariscy.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

PER CURIAM.

Defendants have appealed from convictions of murder of the first degree, upon verdict with no recommendation, and of several counts of robbery of the first degree, and attempted robbery. Defendant Lariscy admitted a prior conviction of felony, and defendant Woollomes admitted two such prior convictions. The jury found that each was armed at the time of the commission of the offenses charged herein. Sentence of death was pronounced against each defendant on the murder counts.

[1] No attack is made on the conviction on the robbery counts. On the murder charges, the evidence is sufficient to sustain the verdicts of murder in the first degree. The record shows that on February 23, 1938, a little after midnight, defendant Lariscy and another man came to the Burp Hollow cafe on North Western avenue in Los Angeles. After sitting there for awhile, they arose and Lariscy drew a revolver and announced that it was a "stick up". He forced one of the waiters to open the cash register, another waiter and a customer to lie on the floor, and robbed the register. His companion also threatened those present with his gun. In the course of this robbery, either he or his companion shot and killed the proprietor, Harold A. Thompson, who was behind the bar. Although no witness testified as to exactly what happened at that moment, the events leading up to it and immediately fol-

lowing it were fully covered in the testimony. H. A. Touby, Lester Beeler, and Royal Tipton, employees of the cafe, testified to the facts just related. Beeler was the waiter who was compelled to lie down on the floor. Tipton was the waiter forced to open the cash register. Mrs. Samuels, a customer, and Alva Epperson, an entertainer, also observed the affair and gave similar testimony.

The identification of Lariscy was positive. That of Woollomes was not quite as strong, but was sufficient. Touby thought Lariscy's companion "resembled" Woollomes except that he seemed heavier. Evelyn Morehead, a waitress, whose testimony at the preliminary examination was read into the record, said that Woollomes looked "very familiar". Mrs. Samuels also thought the man resembled Woollomes. Epperson thought Woollomes was the man who shot Thompson, and Tipton identified Woollomes positively, as one of the two men who robbed the place. He also testified that at the time of the shot he saw Woollomes in front of the bar with smoke coming out of the barrel of his gun.

[2] It is unnecessary to discuss the robbery counts other than to state that the verdicts on these were likewise supported by sufficient testimony.

[3] The alleged errors in the trial are few and may be briefly noticed. The first one is the refusal of the court to grant defendants' motion to exclude witnesses from the courtroom during the testimony of other witnesses. No reason was offered for the motion save the suggestion that the evidence of one might influence the others. The court observed that they had testified in the preliminary examination; that their testimony had been transcribed; that there was more likelihood of influence outside in the hall than in the courtroom; and denied the motion for lack of a sufficient showing of necessity. The matter being one within the sound discretion of the court, this was not error.

[4] It is next asserted that the trial court misquoted testimony by stating that the witness Touby had testified that "the man with Lariscy resembled Mr. Woollomes very much, but he seemed heavier". Touby's actual testimony was: "He resembled him very much, with the exception that he was heavier than Mr. Woollomes * * *." The court's statement was obviously correct.

[5] It is said that the court unjustly criticised counsel for defendant Woollomes. In this instance the record merely shows that an objection was sustained to a question, the court observing that he did not see its materiality, that it seemed "to be directed to a criticism of the officers". There was no misconduct in this.

[6] It is also contended that the court erred in refusing a proffered instruction that the defendants did not have to take the witness stand; but in view of the fact that defendants did in fact take the stand, the instruction would have been irrelevant and confusing. The court fully instructed the jury in the usual manner on the presumption of innocence and burden of proof.

[7] Another instruction refused was to the effect that in the event both defendants were found guilty it was not necessary that each suffer the same penalty. The jury was, however, properly instructed that each defendant could be convicted or acquitted of any of the charges, and that it was entirely for the jury to determine the penalty.

[8] There was, finally, a motion for new trial on the ground of newly discovered evidence, and a purported petition for leave to produce additional evidence. The affidavit of one Fred Seward was produced in support of the motion, and he testified at the hearing thereof. His testimony was simply contradictory of that of other witnesses at the trial, and the trial court found it unworthy of credence and denied the motion. We find nothing in this conclusion which could constitute an abuse of its discretion. Nor is there any warrant for the taking of additional evidence in this court.

The evidence being sufficient to sustain the verdicts, and no error appearing in the trial, the judgments of conviction must be, and they are hereby affirmed.

The order denying new trial is affirmed, and the petition for leave to produce additional evidence is denied.

14 Cal.2d 24

## FEINBERG et al. v. DOE et al.

L. A. 17051.

Supreme Court of California.
July 11, 1939.

**1. Appeal and error** ⚷460(2)

An order of trial court enjoining defendants "from employing, and continuing to employ, or hereafter employing Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers' Union," is in effect a "mandatory injunction," although the form purports to be "prohibitive," where employee at time of issuance of injunction is already in the employ of the defendants, as respects defendants' right to supersedeas on appeal.

[Ed. Note.—For other definitions of "Mandatory Injunction" and "Prohibitive Injunction," see Words & Phrases.]

**2. Appeal and error** ⚷460(2)

In determining whether the order of the trial court was a mandatory or a prohibitive injunction, the Supreme Court would not be bound by the form of the order, but would look to its substance to determine its real nature.

**3. Appeal and error** ⚷460(2)

A mandatory injunction is automatically stayed by the perfecting of an appeal and thereafter the lower court is without jurisdiction to compel obedience to the order from which the appeal has been taken.

**4. Contempt** ⚷20

The term "self-executing" with reference to a judgment denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose.

[Ed. Note.—For other definitions of "Self-executing," see Words & Phrases.]

**5. Judgment** ⚷20

Where it is necessary to use process of contempt to secure compliance with the order of trial court, the order is not "self-executing," since proceedings in contempt are as much an exercise of the power of the lower court as are the issuance of execution by the court, or the appointment of a receiver.

**6. Appeal and error** ⚷460(2)

Defendants were entitled to writ of supersedeas staying proceedings for contempt in violating injunction enjoining defendants from continuing to employ an employee who was not in good standing with trade union on appeal from order granting injunction, since order was not "self-executing."

**7. Appeal and error** ⚷460(2)

The perfecting of an appeal from a mandatory injunction automatically stays proceedings in the trial court, and where trial court erroneously attempts to enforce obedience to the order appealed from, Supreme Court will grant writ of supersedeas as matter of right without reference to the possible irreparable injury to the parties.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Israel Feinberg, as vice president of the International Ladies' Garment Workers Union, and I. Lutsky, as manager of the Joint Board of the International Ladies' Garment Workers Union of the city of Los Angeles, county of Los Angeles, state of California, composed of Locals 65, 84, 96 and 97, against One Doe to Five Doe Company, John Doe One to John Doe Ten, individually, Leo S. Vogel, Ben Vogel and Joseph Vogel, doing business as Evelyn Coats, a copartnership and others arising out of refusal of the copartnership to comply with the award of an arbiter ordering copartnership to release an employee who was not a member in good standing in the International Ladies' Garment Workers Union from further employment. From a judgment and order confirming the award of the arbiter and enjoining copartnership from continuing to employ the employee, Leo S. Vogel and others appeal. On defendants' application for a writ of supersedeas.

Writ issued.

David L. Sefman, of Los Angeles (Jerome D. Rosenfield, of Los Angeles, Fred Vogel, of Santa Ana, of counsel), for appellants.

Charles J. Katz, Alfred Gitelson, J. H. O'Connor, County Counsel, and Douglas De Coster, Asst. County Counsel, all of Los Angeles, for respondents.

CURTIS, Justice.

In this controversy between representatives of the International Ladies' Garment Workers Union, a voluntary unincorporated association, and the defendants, engaged in the manufacturing of ladies' coats and suits, and doing business as copartners under the firm name of Evelyn Coats, and also "Vogel Bros." an award was made by an arbiter, officially designated in a written agreement between the International Ladies' Garment Workers Union, and the Los Angeles Coat and Manufacturing Association, as the "Impartial Chairman". This agreement which had been entered into by the respective parties for the purpose of securing general stabilization of the cloak and suit industry, contained, in addition to certain provisions relative to hours, wages, and working conditions, a method for the arbitration of any difficulties arising between the different factors of the industry. This plan provided that if, following a presentation of a grievance, no adjustment could be amicably reached by the executive director of the Manufacturers' Association, and the manager of the union, the question should be submitted to a joint committee consisting of two persons designated by the Manufacturers' Association and two persons designated by the union. If the joint committee could not agree upon a proper settlement or adjustment of such dispute by a majority of three out of four persons, then the matter should be decided by an impartial chairman whose decision should be final and binding upon all the parties to said agreement. A controversy arose over the continuance in employment by the defendants of an employee named Amelia Greenwood, a former member of one of the local unions comprising the International Ladies' Garment Workers Union, but who had been expelled for participation in the organization of an independent rival union. The arbiter in his award held that the defendants had signed said agreement and were bound by the terms thereof which required the firm to employ only union members in good standing in the International Ladies' Garment Workers Union, that Amelia Greenwood was not a member of the union, having been expelled on August 3, 1938, and directed said defendant, Evelyn Coat & Suit Company, "to release Amelia Greenwood from further employment", within forty-eight hours. The defendant company failed to comply with said award and failed to release Amelia Greenwood from their employ. The representatives of the International Ladies' Garment Workers Union thereupon sought and secured in the superior court in and for the county of Los Angeles an order confirming the award of the arbiter and enjoining and restraining the defendants, "from employing, or continuing to employ, or hereafter employing the said Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers Union". An appeal from said judgment and order confirming the award of the arbiter was duly perfected by said defendants to this court. Thereafter an order to show cause why they should not be punished for contempt in refusing and failing to obey the order of said court to discharge the said Amelia Greenwood as an employee was issued out of said superior court and served upon defendants. The defendants, as petitioners, then made application to this court for a writ of supersedeas to restrain the attempted enforcement by the trial court of said order until the affirmance or reversal of the judgment on appeal. This application is now before us.

The question of the correctness of the decision of the trial court affirming the award of the arbiter is not here involved. The sole question decided is whether the order appealed from was in fact a mandatory injunction, an appeal from which acted as a statutory supersedeas, entitling petitioners as a matter of right to the issuance of a writ of supersedeas to restrain the superior court from finding defendants guilty of contempt and punishing them therefor.

[1-3] We are satisfied that such a writ should issue. Although the form of the order appealed from purports to be prohibitive in that defendants are enjoined and restrained "from employing, and continuing to employ, or hereafter employing Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers' Union", it is quite obvious that said order is in its essence and effect a mandatory injunction. It is an order compelling affirmative action on the part of the defendants. Inasmuch as Amelia Greenwood at the time of the issuance of the order was already in the employ of the defendants, and the very controversy arose out of the continuance in employment of said Amelia Greenwood, it is apparent that the result intended to be accomplished by the issuance of said order was the compulsory release of said Amelia Greenwood from employment by the defendants. In short, the order directed and commanded the defendants to discharge said employee. This conclusion is strongly fortified by the fact that the award of the

arbiter which the judgment confirmed did not contain the prohibitive language enjoining and restraining defendants "from employing * * * or hereafter employing", Amelia Greenwood, but only contained the definite mandate, couched in affirmative language, directing the defendants "to release Amelia Greenwood from further employment". It is, of course, elementary that this court will not be bound by the form of the order but will look to its substance to determine its real nature. Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am.St.Rep. 54; Mark v. Superior Court, 129 Cal. 1, 61 P. 436; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555. It is equally well established that a mandatory injunction is automatically stayed by the perfecting of an appeal and that thereafter the lower court is without jurisdiction to compel obedience to the order from which the appeal has been taken. Ohaver v. Fenech, supra. In view of the fact that the gist of the whole controversy in the instant case was the continuance or noncontinuance of said employee in the employment of defendants, and in view of the fact that the order appealed from was directed solely to this issue, no contention may be legitimately made that the order although mandatory was only ancillary to or subsidiary to another or main order which was prohibitive and therefore not automatically stayed by the perfecting of the appeal.

[4-6] The writ herein sought is the writ of supersedeas, and we are satisfied that this is the proper writ to be issued in the instant case. There would, of course, be no need for the issuance of any writ if the lower court was not mistakenly attempting to enforce obedience to the order appealed from. Foster v. Foster, 5 Cal.2d 669, 55 P.2d 1175; Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706. But the grounds of the application to this court for the writ of supersedeas is the fact that the lower court has already issued an order to show cause why appellants should not be found guilty of contempt for refusal to comply with the order appealed from.

Respondents oppose the issuance of this particular writ upon the ground that the writ of supersedeas being limited in its scope and effect to a restraint of official action, and the improper use of the court's process, such writ is not the proper remedy to restrain a proposed contempt proceeding based upon a judgment which is self-executing. It is argued that no process is required for the enforcement of the order appealed from, and hence there is nothing upon which the supersedeas can act. The premise of respondents' argument, that the order appealed from is self-executing, is not correct. The term "self-executing" is practically self-defining, and obviously denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose. The order appealed from does not purport in and of itself to terminate the status of employer and employee. It, in effect, commands the defendants to release the said employee from their employment. And, in view of the fact that the said employee is not a party to the action, we would be reluctant to hold, even if it could be so held, that the mere entry of the order appealed from would have the effect of changing her status. It follows, therefore, that the use of a process of the lower court is necessary to secure compliance with the order, and to effectuate the result sought to be accomplished by it. Proceedings in contempt are as much an exercise of the power of the lower court as are the issuance of execution by the court, or the appointment of a receiver. Clute v. Superior Court, supra; Wolf v. Gall, 174 Cal. 140, 162 P. 115.

In the cases of Smith v. Smith, 201 Cal. 217, 218, 256 P. 419; Goodall v. Brite, 1 Cal.2d 583, 36 P.2d 190, and Sparling v. Sparling, 94 Cal.App. 593, 594, 271 P. 548, writs of supersedeas were issued under similar circumstances to stay enforcement by the lower court by contempt proceedings of decrees and orders appealed from.

[7] As we are of the opinion that the perfecting of the appeal by appellants operates to automatically stay proceedings in the court below, it is unnecessary for us to balance or weigh the arguments with reference to the possible irreparable injury to appellants or respondents as would be necessary if the question of the issuance of the writ was solely a matter of our discretion.

Let the writ issue as prayed for.

We concur: EDMONDS, J.; SHENK, J.; HOUSER, J.

33 Cal.App.2d 641

## Ex parte PATE.

Cr. 444.

District Court of Appeal, Fourth District, California.

July 10, 1939.

**1. Habeas corpus ⟹85(1)**

On habeas corpus to procure discharge of prisoner, after conviction in justice's court of assault and battery, testimony of justice concerning existence of written complaint, warrant, and proceedings before him, and of complaining witness that he had read complaint, signed it, and had sworn to its truth, corroborated by docket entries, was sufficient to show that there had been a complaint and warrant of arrest, though they had been taken from the files of the justice, mislaid, or lost.

**2. Habeas corpus ⟹25(1)**

The fact that complaint charging petitioner with assault and battery, and warrant of arrest, had either been taken from justice's files, misfiled, or lost, would not entitle petitioner to release in habeas corpus proceeding on ground that record in justice's court did not show offense with which petitioner was charged and of which he was convicted, and that hence a plea of former jeopardy would not be supported in a second prosecution for the same offense, since the contents of a lost or destroyed writing may be proved by parol.

**3. Habeas corpus ⟹27**

Where alleged errors of law in prosecution for assault and battery in justice's court did not go to jurisdiction of justice's court, and the process under which the petitioner was being held was regular on its face, alleged errors could not be urged in habeas corpus proceeding, since such proceeding could only test the jurisdiction of justice's court.

Proceeding in the matter of the application of George H. Pate, also known as George H. White, for a writ of habeas corpus.

Writ discharged and prisoner remanded to sheriff's custody.

Leslie L. Burr, of Imperial, for petitioner.

Elmer W. Heald, Dist. Atty., of El Centro, for respondent.

MARKS, Justice.

This is a proceeding in habeas corpus. The writ was issued because the petitioner alleged in his petition that no complaint accusing him of a crime had been filed against him.

The return of the sheriff has attached to it a true copy of a commitment issued by the justice of the peace of the Third Judicial Township of Imperial county as his authority for restraining petitioner.

The justice of the peace who issued the commitment appeared as a witness in the hearing before us. He testified that he prepared a complaint charging petitioner with assault and battery; that this complaint was signed and sworn to before him by the complaining witness; that a warrant of arrest was issued; that petitioner was brought before him (the justice of the peace); that the complaint was read to petitioner; that he was informed of all his rights; that he requested time in which to plead; that thereafter on the same day, at his own request, he was again brought before the justice of the peace; that he waived time to plead and entered a plea of guilty; that he waived time for pronouncement of judgment; that judgment was then pronounced and the commitment issued. The justice of the peace further testified that the complaint and warrant of arrest cannot now be found; that they either have been taken from his files, misfiled or lost.

The complaining witness testified that the written complaint was prepared by the justice of the peace; that he (the complaining witness) read it, signed it and swore to its truth.

The docket of the justice of the peace was introduced in evidence. Its entries are regular in form and corroborate the parol evidence we have outlined.

[1] Under authority of In re Williams, 183 Cal. 11, 190 P. 163, we must conclude that a complaint charging petitioner with a criminal offense of which the justice's court had jurisdiction, assault and battery, was regularly filed against him. The mere absence of the complaint from the files in the justice's court is not sufficient to overcome the evidence of the witnesses who testified before us.

[2] Petitioner urges that the record as it now stands in the justice's court does not show the offense with which he was charged and of which he stands convicted; that, therefore, a plea of former jeopardy could not be supported in a second prosecution for the same offense. This contention is without merit. The contents of a lost or destroyed writing may be proved by parol. The crime committed by petitioner was clearly described in the evidence given before us. The commitment shows he was convicted of assault and battery.

[3] Petitioner complains of purported errors committed in the justice's court. These were all errors of law which might have been urged on appeal. Such errors of law do not go to the jurisdiction of the justice's court and cannot be urged in this proceeding in habeas corpus which can only test the jurisdiction of that court as the process under which petitioner is held is regular on its face. In re Delgado, 107 Cal. App. 688, 290 P. 589; In re Gutierrez, 1 Cal.App.2d 281, 36 P.2d 712.

The writ is discharged and the prisoner is remanded to the custody of the sheriff of Imperial county.

I concur: BARNARD, P. J.

33 Cal.App.2d 677

## PEOPLE v. MORRIS.

Cr. 3206.

District Court of Appeal, Second District, Division 2, California.

July 17, 1939.

Hearing Denied Aug. 14, 1939.

**1. Forgery 🔑44(1)**

In prosecution for forgery, the specific intent to defraud must be proved.

**2. Criminal law 🔑254**

In prosecution for forgery by forging names of payees on checks, question of alleged fraudulent intent of defendant in indorsing the names was for trial judge as trier of facts.

**3. Criminal law 🔑260(11)**

In prosecution for forgery, where question of alleged fraudulent intent of defendant was for trial judge as trier of fact, if the evidence was such that trial judge could reasonably draw therefrom the inference of intent to defraud, his finding could not be disturbed.

**4. Forgery 🔑44(1)**

In prosecution for forgery, evidence justified finding of fraudulent intent by defendant in endorsing names of payees on checks.

**5. Forgery 🔑5**

That defendant charged with forging names of payees on checks may have intended to pay in full the debts due payees did not relieve defendant from criminal responsibility brought about by his activities in endorsing the names and depositing the checks in his own bank account.

---

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

George B. Morris was convicted of forgery, and he appeals.

Affirmed.

Reuben Licker and Jerome Weber, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for the People.

WOOD, Acting Presiding Justice.

Defendant was charged with nine counts of forgery. At a trial by the court without a jury he was acquitted of the charges contained in counts I and II of the information and was convicted upon counts III to IX inclusive. He appeals from the judgment and from the order denying his motion for a new trial.

Defendant admits that he forged the names of the payees named in the various checks but contends that the prosecution failed to prove that he had done so with the intent to defraud.

Defendant, a builder by occupation, was in need of funds to finance his business, being embarrassed by certain judgments which were of record against him. He engaged the services of Percy C. Bokofsky, an attorney at law, who agreed to furnish the sum of $448, a percentage of the purchase price of five lots in Glendale. Through the intervention of Bokofsky one Edgar D. Walker was induced for a small consideration to act as "dummy" in the transaction. The first payment was made on the lots and title conveyed to Walker and his wife. For the purpose of obtaining funds for construction purposes Mr. and Mrs. Walker executed promissory notes and deeds of trust covering two of the lots in favor of Mutual Building and Loan Association of Pasadena. Notes and deeds of trust covering the other lots were made in favor of Smith and Sons Investment Company. Both of these concerns loaned money for building purposes, the checks issued by Mutual Building and Loan Association being payable to Bokofsky and the checks issued by Smith and Sons being payable to the Walkers.

Defendant obtained possession of two checks issued by Smith and Sons, forged the indorsements of the Walkers and deposited the proceeds in his personal bank account. These two checks form the basis of the charges contained in counts I and II of the information, and the trial court found defendant not guilty on these two counts, holding that there was sufficient evidence of an implied authority to indorse the checks on behalf of the Walkers to prevent a conviction thereon.

The checks payable to Bokofsky were held in trust by him and placed in his "clients account". Thereafter he disbursed the funds to defendant or, upon defendant's order, to the various persons who were furnishing material and labor for the work under construction. He issued checks when requested by defendant without examining the invoices. On several occasions at defendant's request and upon his representation that funds were required to pay outstanding bills Bokofsky issued checks payable to specified contractors but defendant forged the indorsements of the payees named therein and deposited the checks in his personal account. A portion of these funds was used for his personal expenses. The counts upon which defendant was found guilty are based upon these forgeries.

The payees named in the checks referred to in counts III to VII inclusive were later paid the amounts due them but the payees named in the checks referred to in counts VIII and IX have not been fully paid.

A bank account was opened by defendant on August 1, 1938, but the only deposits made in the account were the checks received in the above mentioned transactions. Defendant paid certain construction bills from this account but he admitted that he also made a number of personal withdrawals from it. On some occasions defendant post-dated checks which he issued and occasionally his account was overdrawn. On October 22, 1938, defendant left the state and was arrested in Florida. At that time only one of the houses was completed and construction had ceased on the others.

[1-3] In a prosecution for forgery the specific intent to defraud must be proved. People v. Mitchell, 92 Cal. 590, 28 P. 597. The question of the alleged fraudulent intent of defendant in indorsing the names of various payees was for the trial judge as a trier of fact. If the evidence is such that the trial judge could reasonably draw therefrom the inference of intent to defraud, his finding cannot be disturbed by a reviewing court. People v. Remsberg, 92 Cal.App. 615, 268 P. 672.

[4, 5] We are satisfied that the finding of fraudulent intent by the trial court is justified by the evidence. Defendant began the construction of the buildings without funds and arranged for the receipt of funds from the lending companies for the express purpose of constructing the buildings. The lenders were entitled to have every cent of this money used in the construction of the buildings. The Walkers, who signed the promissory notes, were financially obligated and they also were entitled to have the funds properly applied. Bokofsky held the funds in trust for use only in the construction of the buildings, and defendant had no right whatever to use any portion of the funds for any other purpose. Defendant used at least a portion of the funds improperly for his personal use, and in all of the instances referred to in the information caused delay to the payees in receiving the amounts due them. By the process of depositing the checks received from Bokofsky in his own bank account he obtained the personal use of the funds for certain periods of time. The fact that defendant may have intended to pay in full the debts due to payees named in the checks does not relieve him from the criminal responsibility brought about by his activities in indorsing their names to checks and depositing them in his own bank account. People v. Talbot, 220 Cal. 3, 28 P.2d 1057.

The judgment and order are affirmed.

I concur: McCOMB, J.

## In re GAINES' ESTATE.*

## ANDREWS v. CALIFORNIA TRUST CO.

Civ. 12292.

District Court of Appeal, Second District, Division 2, California.

July 17, 1939.

Hearing Granted Sept. 14, 1939.

**1. Evidence ⇨314(1)**
**Witnesses ⇨397**

Testimony that surviving joint tenant and coexecutor after deceased's death told officers of coexecutor that deceased stated at time joint tenancy contracts respecting safe deposit box and bank accounts were executed that purpose was to facilitate handling of estate after death of deceased, if admissible for purposes of impeachment, could not be used for purpose of substantiating contention that property left in safe deposit box and in bank accounts under joint tenancy agreements was to be held in trust by surviving joint tenant since affirmative issues cannot be proven by hearsay upon hearsay.

**2. Evidence ⇨314(1)**

Declarations and admissions, whether a part of the res gestæ or admissible under exceptions to the rule excluding that character of evidence, are "hearsay," and to permit them to be proven by one other than the person hearing the statements from the lips of the declarant would be to prove hearsay by hearsay, which is not permissible.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

**3. Trusts ⇨25(1)**

Where safe deposit box and bank accounts were held in joint tenancy, letter directing surviving joint tenant to draw upon a bank account other than those in joint tenancy to secure funds for the payment of allowances to widow and to surviving joint tenant and referring to "the key to my safe deposit box" and to "my securities" was not sufficient to establish a trust in favor of estate in property held in joint tenancy.

**4. Abandonment ⇨5**

Where coexecutor sought to establish trust in property held by beneficiary under will and deceased under joint tenancy contracts and will provided that if beneficiary should contest the will he would be cut off with the sum of $1, beneficiary's delay in asserting rights of ownership to contents of safe deposit box and bank accounts claimed under contract of joint tenancy could not be taken as proof of disclaimer of ownership of property.

**5. Trusts ⇨42**

Testimony concerning surviving joint tenant's opinions, feelings and thoughts regarding deceased tenant's intentions in executing joint tenancy instruments was not admissible to show that deceased intended that surviving joint tenant should hold property in trust for the estate.

**6. Evidence ⇨201**

Statements or admissions relating to questions of law may not be admitted in evidence, since a party should not be bound by statements which may be attributed to a misapprehension of his legal rights.

**7. Evidence ⇨265(18)**

Statement of surviving joint tenant that he knew that deceased joint tenant had not intended that property in safe deposit box and joint bank accounts should go to surviving joint tenant individually, if admissible as an oral admission to show that surviving joint tenant was to hold the property in trust for the estate would be viewed with caution. Code Civ.Proc. § 2061, subd. 4.

**8. Trusts ⇨44(1)**

Evidence *held* insufficient to sustain finding that deceased joint tenant intended that surviving joint tenant should take property held under joint tenancy contracts in safe deposit box and bank accounts and hold it in trust for the estate.

**9. Joint tenancy ⇨6**

Where language of instruments creating joint tenancies in contents of safe deposit box and bank accounts was free from ambiguity and intention of parties in executing the agreements was clear, and no claim was made of fraud or undue influence, presumption that surviving joint tenant became sole and exclusive owner of money on deposit at time of death of deceased joint tenant was irrebuttable. Gen.Laws 1937, Act 652, § 15a.

**10. Joint tenancy ⇨6**

Where court found that surviving joint tenant agreed to hold money on joint deposit in trust for the estate, contention that subsequent repudiation of such agreement was "fraud" within express exception contained in statute relating to joint bank accounts

---

*For subsequent opinion see 100 P.2d 1055.

**was without merit, since the fraud contemplated is fraud in the execution or inducement of joint tenancy agreement, not fraud occurring subsequent thereto. Gen.Laws 1937, Act 652, § 15a.**

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

**11. Joint tenancy ⚷6**

A check for dividends on stock in safe deposit box held under joint tenancy contract was property of surviving joint tenant where court had held that stock belonged to survivor.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Charles A. Gaines, also known as C. A. Gaines, deceased, wherein Frederick Andrews and the California Trust Company, a corporation, coexecutors filed separate accounts and each party filed exceptions to the account of the other. From an order settling and approving the account of the California Trust Company, and denying approval of the account of Frederick Andrews, Frederick Andrews appeals.

Reversed.

J. B. Irsfeld, Douglas Fawcett, and James B. Irsfeld, Jr., all of Los Angeles, for appellant.

George E. Farrand and Edward W. Tuttle, both of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

Appellant and respondent who are coexecutors of the will of Charles A. Gaines, deceased, filed separate accounts in the probate court. In appellant's account it is alleged that certain shares of stock, promissory notes and cash are owned by him in his individual capacity by virtue of certain joint tenancy agreements with decedent. In respondent's account it is alleged that the property claimed by appellant individually belongs to the estate. Each party filed exceptions to the account of the other and trial was had upon the issues thus presented. From an order of the court settling and approving the account of respondent and denying approval to the account of appellant this appeal is taken.

Charles A. Gaines died on October 4, 1936. Appellant was his grandnephew, the grandson of a surviving sister. During the summers of 1924 and 1928 appellant spent several weeks with decedent. During the years of 1933 and 1934, appellant saw decedent one or more times a week and on some occasions acted as secretary for him. On January 2, 1934, decedent went alone to a branch of the Seaboard National Bank and asked to rent a safe deposit box, stating that he wished to have appellant sign the contract with him. At that time an employee of the bank asked decedent if he wished appellant to sign as agent or as joint owner, showing him two forms of contract. After reading both forms he selected the joint tenancy form of contract. He was then told by the bank employee that the form of contract which he had selected when signed, would make the contents of the box belong to both decedent and appellant and upon the death of either, the contents would belong solely to the survivor. Decedent then signed the joint tenancy contract in the presence of the bank employee and thereafter on January 23, 1934, appellant also signed the contract at decedent's request and in his presence and in the presence of a bank employee. The contract, which appellant read at that time, provides in substance that decedent and appellant agree with each other and declare to the bank that they have rented the box as joint tenants, with right of survivorship, and that all property contained therein and which may thereafter be placed therein shall be their property as joint tenants with full rights of possession to the survivor in the event of the death of either. The rent for the box was paid by decedent. Each party received a key to the box. In December, 1934, appellant returned his key to decedent stating that he was returning to Ohio and he would be there for a considerable period of time and was afraid that he might mislay it. Decedent accepted the key, agreeing to keep it for appellant. The key was returned to appellant following decedent's death in an envelope which contained a letter dated December 20, 1935, addressed to appellant and signed by decedent. The letter was found in decedent's office safe. Appellant did not place any of his property in the box at any time.

Decedent in August, 1934, again went to the Seaboard National Bank where he had commercial and savings accounts in his individual name and asked for the proper signature cards to change these accounts to joint accounts with appellant. The cards were given him although he did not sign them at that time. On September

1, 1934, appellant signed the joint tenancy commercial account card at decedent's request, it having been theretofore signed by decedent, and the card was returned to the bank on the same day. Appellant signed the joint tenancy special savings account card, which had been signed by decedent, on September 5, 1934, and it was returned to the bank on the same day. Both of these joint tenancy cards provide in substance that appellant and decedent agree with each other and with the bank that all sums theretofore or thereafter deposited by either of said joint depositors shall be owned by them jointly with right of survivorship.

At the time of decedent's death the safe deposit box contained 12,228 shares of common stock of Gillette Safety Razor Company standing in the name of decedent alone, which were valued at $175,000, five promissory notes for a total amount of $25,000, payable to decedent and his wife, said notes representing the balance due upon an agreement for the sale of real property, which was also in the box. There was on deposit in the joint tenancy commercial account the sum of $1,591.10 and in the joint tenancy savings account the sum of $33,344.68. The court found that all of the above-mentioned property was, immediately prior to being deposited in said safe deposit box and accounts, the separate property of decedent. In addition to the joint tenancy accounts decedent had six or eight other individual accounts in various banks, the total amount on deposit in these accounts being approximately $28,000.

Decedent's will, which was executed on March 3, 1936, disposes of an estate the appraised value of which, exclusive of the above-mentioned property, is more than $483,000. The will makes no mention of the joint tenancy instruments, nor does it specifically mention any of the property covered by said joint tenancies. The will disposes of the major portion of the estate to appellant and respondent to be held in trust for a period of fifteen years, during which time the beneficiaries of the trust estate are to receive the total sum of $8,050 per year from the net income, which, leaving out of consideration the joint tenancy property, amounts to approximately $16,000 per year. Appellant is not named as a beneficiary but the will provides that he shall receive part of the trust estate upon the termination of the trust.

Appellant returned to Los Angeles on October 9, 1936, with the remains of his deceased uncle. At that time respondent delivered the letter dated December 20, 1935, which contained the key to the safe deposit box. Decedent had written on the envelope, "Wire Fred Andrews come here at once, C.A.G. Please deliver to Mr. Andrews." The letter follows: "Dear Freddie: Enclosed please find the key to my safe deposit box in the Seaboard Nat. Bank, Hollywood Blvd. at Whitley, which is in our joint names, said box contained most of my securites, stocks, deeds, etc. from my bank account which is in the name of my wife and self you can draw checks for your and her allowance as provided by my will, all other beneficiary payments to be held up until my estate is settled. You can immediately get in touch with California Trust Company, co-executor and start work on settling the estate. Sincerely, Uncle C. A. Gaines." After reading the letter appellant stated to certain of respondent's officers that he did not understand just what his uncle meant by the letter. Appellant read the will and noted the forfeiture clause which provided in substance that any beneficiary who contested the will would receive the sum of $1 in lieu of his share of the estate.

Appellant points out that the written contracts creating the joint tenancies in both the bank accounts and the contents of the safe deposit box are in clear language and contends that the court erred in admitting parol evidence to vary the terms of these contracts. He cites section 1040 of the Civil Code and a number of cases, among them Kunz v. Anglo & London Paris Nat. Bank, 214 Cal. 341, 5 P.2d 417. Respondent contends that the court properly admitted proof to establish a contemporaneous oral trust agreement and that the parties did not intend to create joint tenancies. We deem it unnecessary to decide whether the court made errors in its rulings on the admission of testimony, since we are satisfied that the evidence is insufficient to sustain the finding of the trial court that it was the understanding and intention of decedent and appellant that if appellant survived decedent he would take and hold the property in litigation in trust for the estate.

The contracts standing alone undoubtedly make appellant the exclusive owner of the property in controversy as the surviving joint tenant. To offset this condition respondent must depend upon (a) testimony concerning statements made by appellant after the death of decedent, (b) the letter written by decedent to appellant and (c) the conduct of appellant in delaying his assertion of ownership in the property.

[1, 2] Appellant was sworn as a witness but nothing appears in his testimony to establish an oral agreement that the property should be held otherwise than in joint tenancy. Counsel for respondent laid the foundation for impeaching testimony by asking appellant if he had not made the statement that decedent had told him that he wanted the cards signed so that appellant would have ready access in the event of his death and facilitate the handling of the estate. To this the appellant replied that he did not recall making the statement. Thereafter respondent presented as witnesses certain officers of the respondent corporation who testified that appellant had told them, after the death of decedent, that decedent had stated at the time the cards were signed that it was being done to facilitate the handling of the estate after his death. Conceding that this testimony was admissible for the purpose of impeachment, it could not be used for the purpose of substantiating the issues presented by respondent. Moffatt v. Lewis, 123 Cal.App. 307, 11 P.2d 397; Goodwin v. Robinson, 20 Cal.App.2d 283, 66 P.2d 1257. Respondent sought to prove its affirmative issues by hearsay upon hearsay, a course which may not be permitted. In Humphrey v. Pope, 1 Cal.App. 374, 82 P. 223, 225, the court effectively stated the rule: "Declarations and admissions, whether a part of the res gestæ, or admissible under other exceptions to the rule excluding that character of evidence, are hearsay, and to permit them to be proven, by one other than the person hearing the statements from the lips of the declarant, would be to prove hearsay by hearsay, and this is not permissible. [Citing cases.] Yet that would be the effect of permitting plaintiff to testify as to what her husband told her touching defendant's declarations and acts."

[3] The letter written by decedent to appellant transmitting the key to the safe deposit box is of little if any, aid to respondent in establishing its allegations. Respondent points out that the letter refers to "the key to my safe deposit box" and to "my securities" as an indication that the box was not in joint tenancy. On the other hand, appellant points out that the letter directs him to draw upon a bank account other than those in joint tenancy to secure funds for the payment of allowances to his widow and to appellant. The letter may not be seriously considered as establishing a trust.

[4-8] Respondent lays stress upon the fact that appellant did not claim that the bank accounts and contents of the safe deposit box were his own property until several months had elapsed after the death of decedent. Emphasis is also placed upon the fact that appellant made a trip to obtain information concerning some of the corporate stock in the box and charged his expenses to the estate; that he at first not only disclaimed ownership, but stated to officers of respondent corporation "that he knew that his uncle had not intended that for himself individually, but that his uncle had not told him what he did have in his mind; that he felt that his uncle had intended that that money should be used for estate purposes and he thought there were possibly some things that he wanted taken care of that he had not cared to put in his will, and that he thought that probably if his uncle had lasted longer and had had an opportunity, he might have disclosed those things to him." It must be borne in mind that appellant was one of the remaindermen taking after termination of the trust estate and that the will provided that if a beneficiary should contest the will he would be cut off with the sum of $1; also that the question of the ownership of the property in dispute involved legal problems which could not be easily or quickly decided. His delay in asserting rights of ownership could not be taken as proof of respondent's allegations. Testimony concerning appellant's opinions, feelings and thoughts regarding decedent's intentions in executing the joint tenancy instruments was not admissible in evidence. Statements or admissions relating to questions of law may not be admitted in evidence, since a party should not be bound by statements which may be attributed to a misapprehension of his legal rights. 22 C.J. 298. The further statement that he knew that his uncle had not intended the property for himself individually might be admissible as an admission against interest, an oral admission which under the express provisions of the code is to be viewed with caution. Code Civ.Proc. § 2061, subd. 4. As stated in Hotaling v. Hotaling, 187 Cal. 695, 707, 203 P. 745, 750, "evidence of oral admis-

sions, particularly where inferential rather than direct and explicit, is about the most unreliable and uncertain evidence that can be produced". The admissions of appellant were inferential and not direct or explicit. The evidence concerning the admissions is so lacking in substantiality that it cannot be held that the allegations of respondent are sufficiently supported.

[9] There is an additional reason why the judgment must be reversed as to the property involved in the two bank accounts which were put in joint tenancy by instruments in writing. Section 15a of the Bank Act provides: "When a deposit shall be made in any bank by any person or persons whether minor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, * *. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." Vol. 1, Deering's Gen. Laws (1937), Act 652, p. 207. The language of the instruments creating the joint tenancies is free from ambiguity and the intention of the parties in executing the agreements is clear. No claim was made at the trial that the instruments were the result of fraud or undue influence. The presumption that appellant became the sole and exclusive owner of the money on deposit at the time of decedent's death becomes conclusive and irrebuttable. Wallace v. Riley, 23 Cal.App.2d 669, 74 P.2d 800; Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361; Hurley v. Hibernia Sav. etc. Soc., 126 Cal.App. 314, 14 P.2d 574.

[10] Respondent advances the argument that since the court found that appellant agreed to hold the money on deposit in the bank accounts in trust for the estate, appellant by his subsequent repudiation of such agreement is guilty of fraud within the express exception contained in section 15a of the Bank Act. Clearly such argument is fallacious, for there is no evidence of any fraud in the execution of the contracts. The fraud contemplated by the exception in question is fraud in the execution or inducement of the joint tenancy agreement, not fraud occurring subsequent thereto.

[11] A dividend check in the sum of $3,057, dated September 30, 1936, was found in decedent's office after his death. This check was for dividends upon shares of stock which were in the safe deposit box. In view of our conclusions as to the ownership of the contents of the safe deposit box it is clear that this check should be held to be the property of appellant.

The order is reversed.

I concur: McCOMB, J.

---

33 Cal.App.2d 611

## PEOPLE v. TAGAWA.

Cr. 1681.

District Court of Appeal, Third District, California.

July 5, 1939.

**Criminal law 🔑1131(4)**

Defendant's motion to dismiss an appeal from an order granting a motion for new trial in homicide prosecution or in the alternative affirming the order was denied, where such procedure was not applicable in a criminal case and opening brief of the people was sufficient to require an investigation of the entire record.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

M. Tagawa was convicted of murder in the second degree, and, from an order granting a motion for new trial, the People appeal. On motion to dismiss the appeal or in alternative affirm the order.

Motion denied.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Edgar B. Hervey, of San Diego, and Walter T. Tsukamoto, of Sacramento, for respondent.

PER CURIAM.

Defendant was convicted, before a jury, of murder in the second degree. The court granted a motion for new trial, and the People now appeal from the order.

Defendant now moves this court for an order dismissing the appeal, or in the alternative affirming the order. No statute or precedent is mentioned to support the procedure. Defendant's ground is that the action of the trial court was entirely discretionary, and that the record shows no abuse of such discretion. In the first place we find no such *procedure* applicable to a criminal case, and in the second place, we believe that the opening brief of the People has sufficient merit to require an investigation of the entire record, something which is not contemplated on a motion of this character.

The motion is denied.

---

33 Cal.App.2d 644

## MYRICK v. O'NEILL et ux.

Civ. 6045.

District Court of Appeal, Third District, California.

July 12, 1939.

Rehearing Denied Aug. 11, 1939.

Hearing Denied Sept. 6, 1939.

**1. Taxation 🔑117**

The effect of the constitutional amendment authorizing tax on privilege of exercising corporate franchise, in lieu of tax on franchise at actual cash value, was to substitute an excise tax for the ad valorem tax theretofore authorized, and thereafter the legislature was without power to provide for an ad valorem franchise tax. Const. art. 13, § 14(d), and § 16, subd. 2(a), adopted in 1928.

**2. Taxation 🔑113**

The effect of corporation's default in payment of excise tax would be governed by the provisions in the Bank and Corporation Franchise Tax Act, which was enacted subsequent to constitutional amendment authorizing excise tax on corporate franchise, in lieu of ad valorem tax, and not by statute enacted prior to the constitutional amendment. Pol.Code, § 3669c, subd. 2, as amended by St.1919, p. 181; St.1931, p. 69, § 32; Const. art. 13, § 14(d), and § 16, subd. 2(a), adopted in 1928.

**3. Corporations 🔑617(2)**

Under provision in Bank and Corporation Franchise Tax Act suspending corporation's powers and privileges for failure to pay franchise tax, a contract entered into by the corporation while its corporate powers are suspended is voidable only, and not void. St.1931, p. 69, § 32.

**4. Contracts 🔑136**

A "voidable contract" is one which might be rendered null at the option of one of the parties, but is not void until so rendered.

[Ed. Note.—For other definitions of "Voidable," see Words & Phrases.]

**5. Corporations 🔑617(2)**

The inference to be drawn from amendment to the section in the Bank and Corporation Franchise Tax Act, providing that corporation's failure to pay franchise tax suspends powers and privileges of corporation, and "that every contract made in violation of this section should be voidable," by adding the words "at the instance of any party other than the taxpayer," is that until language was so added, such a contract was voidable by anyone, including the taxpayer, and the amendment operates as a restriction in such regard. St.1929, p. 33, § 32; St.1935, p. 999, § 32.

**6. Corporations 🔑617(2)**

A judgment creditor of corporation could not claim that deed to realty executed by corporation was void because deed was executed after corporation's corporate powers had been suspended for failure to pay franchise tax, where there had been no judicial adjudication declaring deed void. St.1931, p. 69, § 32.

---

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by O. H. Myrick against William H. O'Neill and Zetta B. O'Neill to quiet title to certain realty. From a judgment quieting plaintiff's title to the realty, subject to the lien of a mortgage held by the defendants, the plaintiff appeals.

Affirmed.

O. H. Myrick and Albert S. Brown, both of Los Angeles, for appellant.

Avery M. Blount and B. B. Gillette, both of Los Angeles, for respondents.

HELD, Justice pro tem., delivered the opinion of the court.

On May 1, 1931, and for some time prior thereto, title to the premises involved in this action was in Susana Land Company, a California corporation. The corporation failed to pay its franchise tax in 1930, and thereupon and on May 1, 1931, its corporate powers, rights and privileges were suspended pursuant to section 32 of the Bank and Corporation Franchise Tax Act (Deering's 1937 General Laws, Act 8488). There has been no revivor of corporate powers. After the date of such suspension, and on December 11, 1931, the corporation executed a deed for the premises to Susan McNally, and on December 15, 1931, said Susan McNally executed to defendants a promissory note and a mortgage on said premises to secure payment of said promissory note. The deed and mortgage were recorded on January 6, 1932, in the office of the county recorder of the county of Los Angeles.

On March 19, 1932, the plaintiff herein instituted an action in the municipal court of the city of Los Angeles against Susan McNally and Susana Land Company, a corporation, to recover the sum of $1,999 for services rendered. After trial had, plaintiff was awarded judgment against the corporation alone for the sum of $600. Judgment was entered on October 31, 1932. Execution issued thereon, and levy made by the sheriff on the premises herein involved. On August 14, 1933, the premises were sold by the sheriff at execution sale to plaintiff herein for $713.63. No redemption was made from the sale, and on August 15, 1934, plaintiff received sheriff's deed.

The complaint in the present action as originally filed, alleged four causes of action. The first was in the usual form to quiet title, and the allegations thereof were, by reference, incorporated in each of the subsequent counts, and, in addition thereto, the second, third and fourth causes of action contained allegations setting forth the suspension of corporate powers of Susana Land Company, the execution of the deed and mortgage after such suspension, and other matters which by a fair construction of the pleading constituted the same a bill quia timet to remove the cloud upon plaintiff's title arising out of the execution of the deed and mortgage, the validity of which were thus directly attacked.

On motion of defendants, there was stricken from the complaint all the allegations thereof, except those contained in the first cause of action and by reference incorporated in the subsequent ones. The complaint thus became one simply to quiet title, and in no wise involved a direct attack on the deed and mortgage.

The defendants' answer denied the allegations of the complaint, and in addition set up three affirmative defenses; the first, alleging that defendants hold a mortgage on the premises; the second, that said mortgage was a lien at the time plaintiff acquired title; and the third, that plaintiff had knowledge of the existence of the mortgage and the lien thereof when he acquired title at execution sale.

Plaintiff had judgment in the court below, quieting his title to the premises, but subject to the lien of the mortgage executed by Susan McNally on December 15, 1931. Plaintiff appeals from the judgment.

Appellant contends that the deed executed by Susana Land Company to Susan McNally was void by reason of the suspension of the corporate powers of the grantor; that therefore defendants acquired no lien by the mortgage executed to them by Susan McNally, and that the trial court erred in holding that appellant's title is subject to the lien of said mortgage. If the deed of the corporation was absolutely void, it conveyed no title to Susan McNally. If, on the other hand, it was voidable only, it was valid until cancelled on direct attack. Here under the pleadings as they were at the trial, there was no such direct attack; the complaint sought to quiet title, defendants set up their mortgage, and on rebuttal plaintiff showed suspension of the corporate powers of Susana Land Company.

In support of his contention that the deed of the corporation to Susan McNally is void, appellant cites Political Code, § 3669c, second paragraph, and section 32 of the Bank and Corporation Franchise Tax Act. On May 1, 1931, the date of the suspension of the powers of the corporation, section 3669c of the Political

Code (Stats.1919, p. 181), among other provisions, contained the following: "Every contract made in violation of this section is hereby declared to be *void.*" Section 32 of the Bank and Corporation Franchise Tax Act then (Stats.1931, pp. 64, 69) provided that "every contract made in violation of this section is hereby declared to be *voidable*". The suspension in the instant case was expressly declared to be "pursuant to the provisions of section 32 of the Bank and Corporation Franchise Tax Act of the State of California". That section would appear to govern the situation here.

[1] In 1910 there was adopted a constitutional amendment adding section 14, article XIII, to the Constitution of this state, providing for the separation of state and local taxation, and for the taxation of certain corporations for the benefit of the state. Subdivision (d) covered corporations such as the Susana Land Company. Subdivision (f) provided that "the Legislature shall pass all laws necessary to carry this section into effect". The legislature thereupon enacted, and on April 1, 1911, there was approved by the governor, an act to comply with the constitutional mandate. Stats.1911, p. 530. Amendments to this act were made in 1913 and 1915. Stats.1913, pp. 3 and 615; Stats.1915, pp. 3 and 937. In 1917, a revision of the act approved April 1, 1911, and amendments thereto, was made, and a substitute therefor enacted. St.1917, p. 336. This substitute was incorporated in the Political Code, and after repealing certain existing sections, added others, among them section 3669c. The latter section was amended in 1919 (Stats.1919, p. 181), to read as it stood at the date of the suspension of powers of the corporation here involved. In November, 1928, section 16 of article XIII was added to the Constitution, and subdivision 2(a) of that section provided that corporations subject to be taxed pursuant to subdivision (d) of section 14, in lieu of the tax thereby provided for, should annually pay to the state for the privilege of exercising their corporate franchises within the state a tax equal to four per cent of their net incomes. The amendment also enjoined upon the legislature the duty to pass a law to carry the provision into effect, and in 1929, there was enacted the Bank and Corporation Franchise Tax Act (Stats.1929, p. 19), which was amended in 1931 (Stats.1931, p. 64) to read as it stood at the date of the suspension of powers of the corporation here involved. The effect of the constitutional amendment of November 6, 1928, and the legislation enacted pursuant thereto, was to substitute an excise or license tax authorized by subdivision 2(a) of section 16, article XIII for the ad valorem or property tax theretofore authorized by subdivision (d) of section 14, Article XIII, and thereafter the legislature was without power to provide for an ad valorem franchise tax. City Investments, Ltd., v. Johnson, 6 Cal.2d 150, 56 P.2d 939.

[2] The tax, in the payment of which the corporation here defaulted, was the excise or license tax; and on nonpayment, the situation was governed by section 32 of the Bank and Corporation Franchise Tax Act, and not by section 3669c of the Political Code. The latter section has no application here whatever.

[3] As we have seen, section 32 of the Bank and Corporation Franchise Tax Act does not by its terms render void a contract entered into by a corporation while its powers are suspended. The language is that it is voidable. Nor are the cases of Cleveland v. Gore Bros., Inc., 14 Cal. App.2d 681, 58 P.2d 931, and Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P.2d 968, authority for holding a contract under such circumstances void. In the former case the assignee of a corporation whose powers were suspended was denied the right to maintain an action; and in the latter case, the right to defend was denied a corporation under suspension.

[4] On the other hand, in Depner v. Joseph Zukin Blouses, 13 Cal.App.2d 124, 56 P.2d 574, 575, under similar circumstances as those which exist here, it was said that "a voidable contract is one which may be rendered null at the option of one of the parties, *but is not void until so rendered*". This case was followed in Storrs v. Belmont Gold Min. & Mill. Co., 24 Cal.App. 2d 551, 76 P.2d 197. In each case, a hearing in the Supreme Court was denied.

[5] It is significant that section 32 of the Bank and Franchise Corporation Tax Act, which as originally enacted read in part that "every contract made in violation of this section is hereby declared to be voidable", continued so to provide until the legislature in 1935 (Stats.1935, pp. 999, 1000), added the words "at the instance of any party other than the taxpayer". The inference to be drawn from this amendment is that until the language

was so added such a contract was voidable at the instance of anyone, including the taxpayer. The amendment operates as a restriction in that regard. It certainly could not be contended that as the section reads at present a contract is absolutely void and not merely voidable.

[6] The deed in question being in the first instance voidable merely, and not void, and there having been no adjudication since, adjudging its invalidity, operated to convey title to Susan McNally, and her mortgage to defendants created a lien upon the premises herein involved, and the trial court was correct in its conclusions.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 680

## BERGMAN v. ORNBAUN et al.

Civ. 6169.

District Court of Appeal, Third District, California.

July 17, 1939.

**1. Contracts 🔑108(2)**
**Gifts 🔑5(2)**
**Wills 🔑89**

Where aged unmarried man deeded land in consideration for note secured by deed of trust, which note was payable in installments and provided that upon death of payee all unpaid indebtedness on the note was canceled, the transaction was not void either as a "gift inter vivos" or as a "testamentary disposition," but was a valid and enforceable "contract," not against public policy.

[Ed. Note.—For other definitions of "Contract," "Gift Inter Vivos" and "Testamentary Disposition," see Words & Phrases.]

**2. Wills 🔑87**

Whether or not an instrument is testamentary in character depends upon the intention of the maker.

**3. Wills 🔑88(1)**

The essential distinction between a contractual obligation and a "testamentary disposition" is that the "contract" contemplates performance, in part at least, during the lifetime and vests some quantum of present interest in the other party.

**4. Deeds 🔑99**

Where deed transferring property, promissory note for purchase price, trust deed securing note, and release on the note were all made at the same time, they were required to be construed together as part of the same transaction. Civ.Code, § 1642.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by Gus Adolph Bergman against Ida M. Ornbaun, individually and as executrix of the last will and testament of the estate of P. M. Irish, deceased, and others, to cancel a promissory note and a deed of trust. From an adverse judgment, plaintiff appeals.

Judgment reversed and directed in accordance with opinion.

Hjelm & Hjelm, of Turlock, for appellant.

James C. Nichols, of Stockton, for respondents.

ALLEN, Justice pro tem., delivered the opinion of the court.

The undisputed facts in this case are: That on the 29th day of December, 1936, and prior thereto, P. M. Irish, a single man of the age of approximately seventy years, was the owner of a tract of thirty acres of land in Merced county, and on this day he deeded same to plaintiff, the consideration for such conveyance being evidenced by a promissory note of the same date, and such note being secured by a deed of trust on the property conveyed. The promissory note was as follows:

"$5000.00 Turlock, California,
"December 29, 1936.

"As hereafter provided, for value received, I promise to pay to the order of P. M. Irish, a single man, at the Bank of America National Trust and Savings Association, Turlock, California, the sum of Five Thousand Dollars in lawful money of the United States of America, without interest; said sum to be paid as follows:

Two Hundred Dollars on the second day of January, 1937, Two Hundred Dollars on the second day of July, 1937, and Two Hundred Dollars on each succeeding second day of January and second day of July thereafter until the whole of said sum shall have been paid. If default be made in the payment of any installment of this note when due, the holder thereof may, at his option, declare the whole of the unpaid portion thereof immediately due and payable. In case suit is brought to collect this note, or any part thereof, I promise to pay a reasonable attorney fee. This note shall not be negotiable by reason of an agreement between the maker and payee hereof that in the event of the death of the payee before this note is fully paid all further indebtedness shall be canceled.
"Gus Adolph Bergman.

"In the event of my death before this note has been fully paid, all payments which would otherwise be made hereunder are hereby canceled, and upon payment of all sums due hereunder prior to the date of my death this note shall be fully paid, satisfied and discharged.

"Dated: December 29, 1936.
"P. M. Irish."

[1-3] The payee named in said note died on the 18th day of October, 1937, and at the time of his death, plaintiff had paid all instalments due on said note, amounting to $400, and was not in default. Defendant Ida M. Ornbaun is the executrix of the estate of said P. M. Irish, deceased, and the other defendants are his heirs at law. After the death of Irish plaintiff sued to cancel the promissory note and deed of trust on the ground same had been satisfied. The court refused plaintiff this relief. The court based its judgment on two conclusions: First, that the transaction was either a gift inter vivos; or, second, an attempted testamentary disposition, and in either case, was wholly void. The transaction, as we view the evidence, is neither a gift inter vivos nor an attempted testamentary disposition. It is very plain the consideration plaintiff promised to pay for this property was $200 semi-annually during the life of Irish, and not exceeding in all $5,000. The fact that Irish was an aged man might have been a reason why plaintiff agreed to take the property on this condition. If Irish desired to sell his property for this consideration, and plaintiff agreed to purchase same on such terms, such agreement was not against public policy, and we do not see why it should not be carried out. The language in the case of In re Murphy's Estate, 191 Wash. 180, 71 P.2d 6, 11, illustrates very clearly the difference between a testamentary disposition and a contract: "'In the extreme types, there is a little chance of confusion between wills and contracts. A will is dispositive; a contract promissory. A will is gratuitous; while contract, if not under seal, requires consideration. If the instrument provides for performance at the death of the promisor, there is a greater chance for confusion; and, if the consideration is insufficient, the distinction becomes of the highest importance. If the instrument creates a right in the promisee before death of the testator, the instrument is a contract, or, at least a defective attempt to make a contract rather than a will.' 1 Page on Wills 2d Ed., § 70, p. 120. 'In determining whether an instrument is a contract or a will, the dominant purpose of the maker as manifested therein must control. So the question whether any given writing is a will or a contract must be determined by the character of its contents rather than by its title or any formal words with which it may begin or conclude; but words which do not change the legal effect of the instrument may, nevertheless be significant in determining its character and intention with which it was made.'' 1 C.J. 619, par. 238. Whether or not an instrument is testamentary in character, depends upon the intention of the maker. It is the animus testandi that makes the instrument a will. When the animus testandi is established, the character of instrument is fixed, and is a will if the other requirements as to form and execution have been complied with. 'In the absence of testamentary attempt, there can be no will. 25 R.C.L. 59, par. 3. "The essential distinction between a contractual obligation and a testamentary disposition is that the contract contemplates performance in part at least, during the lifetime, and vests some quantum of present interest in the other party. So, although an agreement involves or effectuates a disposition of property belonging to a party thereto, it is valid as a contract and not as a will where it contemplates performance at least in part during his lifetime or vests a present interest in the other party." Applying these principles in the case at bar, it must be very

clear that there is no testamentary disposition.

The lower court based its decision on the case of In re McEuen's Estate, 18 Cal. App.2d 180, 63 P.2d 332, but the case is clearly distinguishable from the case at bar. In that case, the decedent, on May 8, 1934, entered into a written contract with Eleanor F. Layton to sell her certain real property for the price of $1,000, payable in monthly instalments of $10 each. It is apparent that this contract intended a definite obligation requiring Layton to pay the deceased $1,000 at the rate of $10 a month. In the month of September, 1934, several months after the contract was made, the deceased wrote the following on the contract: "In the event of my death the property is to be hers (Eleanor R. Layton's) without further payment." It was not shown that there was any consideration for this endorsement on the contract, and clearly it was a gift, but it would fail as a gift inter vivos because there was no delivery, and if intended as a testamentary disposition, it was void, because not properly executed.

In the present case, Irish was not trying to dispose of any property left at the time of his death. The language in the case of In re Murphy's Estate, supra, illustrates clearly the difference between a testamentary disposition and a contract. If Irish desired to sell his property for this consideration, and plaintiff took same, such agreement was not against public policy, and we cannot see why it cannot be carried out.

[4] It is important to note in this case that the transfer of the property, the deed of trust, the promissory note, and the release on the promissory note were all made at the same time, and are therefore all to be construed together, and as part of the same transaction. Civ.Code, § 1642; Goodwin v. Nickerson, 51 Cal. 166; Symonds v. Sherman, 219 Cal. 249, 250, 26 P.2d 293, 294. In the case of Symonds v. Sherman, supra, a promissory note in the sum of $2,500 was in question. The note was given for a certain consideration, and it was understood that the interest should be paid thereon by the maker, and that the amount remaining unpaid at the death of the payee should be canceled. After the death of the maker, the note was found, and pinned to it and folded therewith was found another document of the same date entirely in the maker's handwriting reading as follows: "'August 12, 1924. To whom it may concern: This note of Nettie N. Childs is to be given back to her at the time of my death as compensation for kindness shown to me.

"'Mrs. J. W. Garrison.
"'Redlands, California.
"'This is my own handwriting.'"

The court held the several papers relating to the same subject-matter and executed as parts of substantial parts of one transaction, and that the circumstances in that case show an agreement on ample consideration, as evidenced by a written memorandum that the principal on the note was not to be paid, and upheld a judgment canceling the note. In Daugherty v. Preuitt, 113 Okl. 66, 242 P. 529, 530, the promissory note in question there contained this endorsement: "If the payee of this note does not survive the maker thereof, then this note is not to be paid, but is to be canceled and surrendered. Orin S. Prueitt." The court held that this was a conditional agreement, and stated: "This was a good contract for the decedent, for, if he had lived, he would have retained the use and benefit of his property, and would have received from the defendant each year thereafter as the notes became due the amount stated therein. The defendant could not anticipate, neither could the decedent, the length of time the decedent would live after said notes were executed. The record discloses the approximate cause of decedent's death was an accident. * * * The proviso was a part of said notes at the time defendant executed same. We are of the opinion that said notes should be canceled and surrendered to the defendant, and that the trial court erred in not so holding."

In McGlasson v. McGlasson's Executor, Ky., 56 S.W. 510, a promissory note was given as consideration for the transfer of certain property, and contained the following provision: "If not paid during the holder's life (Leonard McGlasson), this note is void, or not attempted to be collected. Perry McGlasson." In that case, the following instruction was given to the jury: "If the jury shall believe from the evidence before them that it was the purpose and intention of the decedent, Leonard McGlasson, and defendant, Perry McGlasson, at the time they entered into the contract sued on, and that by the terms of the contract the unpaid balance of said note at Leonard McGlasson's death was not to be paid, and the note should become void as to that part, they should find for the defendant." The court held that this instruction should have been given to the jury, and stated: "We are of the opinion that, taking the language of the note into consideration, the true meaning and intent of the parties was that, if the note was not collected during the lifetime of Leonard McGlasson, it became void, and no attempt should be made to collect it.

In the case at bar, as heretofore stated, there was not any gift in this case, because at the death of the maker of this note, the obligation ceased and there was nothing to give, and for the same reason that there was no attempted testamentary disposition.

We are of the opinion that the court erred in holding that the present case was either a gift or an attempted testamentary disposition. It was clearly a valid contract based on a sufficient consideration, and the note being fully paid, according to its terms should be delivered up and canceled and a reconveyance made of the trust property.

The judgment is reversed and the court is directed to render judgment in accordance with the foregoing opinion quieting plaintiff's title to the property described in the complaint, and ordering a reconveyance of the trust property and a cancellation of the promissory note.

We concur: PULLEN, P. J.; THOMPSON, J.

WEST KEY NUMBER SYSTEM

---

33 Cal.App.2d 686

**WILLIAMS v. HEBBARD et al.**

**Civ. 6127.**

District Court of Appeal, Third District, California.

July 17, 1939.

**1. Boundaries 🔑3(3)**

Permanent and visible or ascertained boundaries or monuments are paramount over measurements where same are inconsistent. Code Civ.Proc. § 2077.

**2. Boundaries 🔑3(3)**

Rule that permanent and visible or ascertained boundaries or monuments are paramount over measurements where same are inconsistent is a rule for construing descriptions in deeds or other written instruments and does not mean that a court can go outside of deed to find a monument not mentioned therein and make the description fit to it. Code Civ.Proc. § 2077.

**3. Reformation of Instruments 🔑19(1)**

If the description in a deed did not cover the land intended by both parties to be conveyed, because of mutual mistake, reformation of the deed would have been a proper remedy.

**4. Reformation of Instruments 🔑26**

If a common grantor's deed to plaintiff did not describe land intended to be conveyed, plaintiff could have sued common grantor for a reformation of deed and could have compelled correction if common grantor was still owner of omitted land.

**5. Reformation of Instruments 🔑19(1), 26**

If a deed executed by common grantor to defendant after a conveyance of adjoining land to plaintiff, through mutual mistake of defendant and common grantor, covered a disputed tract lying between plaintiff's and defendant's lands, which was not intended to be conveyed to defendant, the common grantor could have sued defendant for a reformation of defendant's deed and such right to have deed corrected would pass to successors in interest of common grantor.

**6. Quieting title 🔑10(2)**

As respects action to quiet title, where common grantor conveyed land to plaintiff and thereafter conveyed adjoining land to defendant and deed to plaintiff did not describe as much land as intended and common grantor executed a second deed to plaintiff after the conveyance to defendant, such second deed conveyed to plaintiff all right, if any, which grantor had to disputed tract lying between plaintiff's and defendant's lands, including the right to sue defendant for a reformation of deed to defendant on ground of mutual mistake.

**7. Quieting title 🔑10(2)**

As respects action to quiet title, where common grantor deeded land to plaintiff and thereafter deed adjoining land to defendant and deed to plaintiff did not describe as much land as was intended and grantor executed a second deed to plaintiff after the conveyance to defendant, such second deed to plaintiff gave plaintiff merely an equitable right to have the common grantor's deed to defendant reformed, if there was a mutual mistake in its execution, since defendant was holder of record and legal title to disputed parcel when common grantor executed second deed to plaintiff.

**8. Quieting title** ⚷10(2)

A mere equitable right to have a deed reformed will not support an action to quiet title.

**9. Quieting title** ⚷27

Where plaintiff's right, if any, was merely an equitable right to have a deed reformed, plaintiff mistook his remedy when he filed a complaint to quiet title.

**10. Quieting title** ⚷39

Plaintiff in a quiet title suit, as cross-defendant, had a right to set up any equitable defense that he had as an adverse claim as against cross-complainant's suit to quiet title.

**11. Quieting title** ⚷43

In quiet title suit, where defendant filed cross-complaint claiming ownership of disputed tract by reason of deed from common grantor, mutual mistake was properly brought in issue by plaintiff's answer to cross-complaint alleging there was a mutual mistake in a deed to plaintiff from common grantor and also in the deed to defendant from common grantor. Code Civ.Proc. § 738.

**12. Quieting title** ⚷44(4)

In quiet title suit where defendant filed cross-complaint, evidence *held* sufficient to support findings against plaintiff on his complaint and that defendant was owner of disputed tract, and that plaintiff had no right or interest therein.

**13. Trial** ⚷397(1)

In quiet title suit, where defendant filed cross-complaint and trial court found defendant owned disputed tract and that plaintiff had no interest therein, the finding being against plaintiff and in favor of cross-complainant, it was not necessary for trial court to find on each probative fact set forth in plaintiff's answer to cross-complaint in support of plaintiff's adverse claim, since trial court found on ultimate facts that plaintiff had no interest in land in controversy.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Suit to quiet title by George T. Williams against F. A. Hebbard and another, wherein the named defendant filed a cross-complaint. From an unsatisfactory judgment, plaintiff appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

Roland J. White and William F. White, both of San Francisco, for respondents.

ALLEN, Justice pro tem., delivered the opinion of the court.

This action arose out of certain deeds of conveyance made to the respective parties by a common grantor. One Armistead owned lot 37 situate in sections 4, 8, 9 and 17, township 18 north, range 8 east, M. D. B. & M., in Yuba county. On November 10, 1932, Armistead deeded to plaintiff the northern portion of said lot 37 by the following description: "A strip of land commencing on the west boundary of the Great Eastern Mine, at a point where the right bank of Willow Creek crosses the eastern boundary of said Nevada Mining Company's Placer Mine and extending along said right bank a distance of 755 feet; thence at right angles to the left bank of said Willow Creek along said left bank of said Creek to the point where said left bank crosses the east boundary of said Nevada Mining Company's Placer Mine." On September 27, 1933, said Armistead deeded to defendant F. A. Hebbard the southern portion of said lot 37, by conveyance containing the following description: "Nevada Mining Co. Placer Mine, also described as Lot 37, situated in Sections 4, 8, 9 and 17, Township 18 North, R. 8 East, M. D. B. & M., according to the United States Plat of Survey of said mining claim, being particularly described in Patent, United States of America, to Josiah P. Brown, et als., dated March 19th, 1875, recorded May 5th, 1875 in Book I of Patents, page 343, excepting Parcel I (not material here), Parcel 2. 'A strip of land commencing at the west boundary of the Great Eastern Mine at a point where the right bank of Willow Creek crosses the eastern boundary of Nevada Mining Company's Placer Mine, and extending along said right bank 755 feet; thence at right angles to the left bank of Willow Creek; thence along the left bank of said Creek to a point where said left bank crosses the east boundary of Nevada Mining Company's

Placer Mine, and thence to the point of beginning, being the property described in the deed from C. H. Armistead to George T. Williams, dated November 10th, 1932, recorded November 22nd, 1932, in Book 17, Official Records, page 181.'" This exception in the deed to Hebbard, being the same description as the land deeded by Armistead to Williams, November 10, 1932. There is no dispute as to the northern boundary of the parcel conveyed to Williams, and the court found that there is no ambiguity in the Williams' deed as locating a definite tract of land.

The undisputed evidence showed that the description for this Williams' deed was obtained by a United States forest ranger named Meggers pacing from the north boundary of the tract to a point which he thought was 755 feet from the north boundary, and at which point he blazed a small, yellow pine tree. There is testimony that Armistead put a small iron stake and blazed a tree at this point shortly after Meggers had paced the land as indicating the south boundary of the tract he intended to convey to Williams. After the conveyance to Hebbard, it was found that the place where Hebbard is purported to have placed the iron stake was 792.20 feet from the north boundary, instead of being 755 feet, as set forth in the Williams' deed. This was later ascertained by a survey of the land. Williams called on Armistead to make a correction, and on December 29, 1933, Williams deeded back to Armistead by quitclaim deed the land he received by his deed from said Armistead, and by the same description, and on the same day Armistead redeeded to Williams a tract which, according to the surveyor's notes, placed the south boundary 792.20 feet from the north boundary of the tract, and covering a parcel of land 37.2 feet in width and extending across the property.

[1-6] The first point made by appellant in his brief is as follows: Permanent and visible or ascertained boundaries or monuments are paramount over measurements where same are inconsistent. There is no question that this is a correct rule of law, but the first deed from Armistead to Williams does not make a call to any stake or monument. It apparently extended down 755 feet from the north boundary of lot No. 37. This rule is laid down in section 2077 of the Code of Civil Procedure and is a rule for construing descriptions in deeds, or other written instruments, and does not mean that a court can go outside of the deed to find a monument not mentioned in the instrument and make the description fit to it. This is so apparent from the section itself and is so elementary that it requires no authority to support it. If the description in the deed does not cover the land intended by both parties to be conveyed, because of a mutual mistake, reformation of the deed would have been the proper remedy. If Armistead's deed to plaintiff did not cover the land intended, plaintiff could have sued Armistead for a reformation, and could have compelled correction if Armistead was still the owner of the omitted land. Also, if the later deed from Armistead to Hebbard, through mutual mistake of Hebbard and Armistead, covered this disputed tract, that was not intended to be conveyed to Hebbard, then Armistead could have sued Hebbard for a reformation of the deed. This right to have the deed corrected would pass to the successors in interest to Armistead. Therefore, the deed from Armistead to Williams on December 29, 1933, conveyed to Williams all right, if any, Armistead had to the disputed tract, including the right to sue Hebbard for a reformation thereof on the ground of mutual mistake.

[7-9] It is important to consider the pleadings in this case. Plaintiff sued to quiet title to the land according to the description in the second Armistead deed to him. Defendant was at that time under his deed of September 27, 1933, from Armistead, the holder of the record and legal title to the disputed parcel, and the most the plaintiff's second deed could give him was an equitable right to have the Armistead deed to Hebbard reformed, if there was a mutual mistake in its execution. It has been held in this state that a mere equitable right to have a deed reformed will not support an action to quiet title. Castro v. Barry, 79 Cal. 443, 21 P. 946; Von Drachenfels v. Doolittle, 77 Cal. 295, 19 P. 518; Fudickar v. West Riverside Irrigation District, 109 Cal. 29, 41 P. 1024; Chapman v. Hicks, 41 Cal.App. 158-165, 182 P. 336. It would appear that plaintiff mistook his remedy when he filed complaint to quiet title.

[10, 11] Defendant denies plaintiff's title to the disputed parcel and alleges the defendant is the owner of said disputed tract in fee, and by way of cross-complaint sued to quiet defendant's title to all the land covered by the Armistead deed to him,

including the disputed tract, and alleges that the plaintiff claims an adverse claim thereto, and avers that said plaintiff's claim is without right. Plaintiff answers this cross-complaint and sets up his adverse claim by way of answer to the cross-complaint, alleging there was a mutual mistake in the first Armistead deed to him and also a mutual mistake in the Armistead deed to Hebbard. Plaintiff also alleges that Hebbard had knowledge of plaintiff's ownership and possession of said tract, and that the boundaries between the tract that Hebbard was buying and the Williams' property was pointed out to Hebbard at the time before he purchased. The plaintiff, as cross-defendant, had a right to set up any equitable defense that he had as an adverse claim as against cross-complainant's action to quiet title. Therefore, the mutual mistake was properly brought in issue by the answer to the cross-complaint. Sec. 738, Code Civ.Proc.; Pennie v. Hildreth, 81 Cal. 127, 22 P. 398; Bancroft Code Pleadings, vol. 4, p. 3904; Whitney v. Sherman, 178 Cal. 435, 173 P. 931; Milliken v. Valencia, 47 Cal.App. 16, 189 P. 1049; Bancroft Code Pleadings, Practice & Remedies, 10 Yr.Supp., vol. 2, p. 1058.

[12, 13] The court found against plaintiff on his complaint, and found that defendant and cross-complainant was the owner of the land described in his deed, including the disputed tract, and found that plaintiff and cross-defendant had no right, title, claim or interest therein. There is sufficient evidence to support these findings and there is no claim by appellant that the evidence is insufficient to support the findings. It is true the court did not make a particular finding on the allegations in the answer to cross-complaint, that the boundaries of plaintiff's land were pointed out to defendant when Armistead sold to him, and that the defendant had knowledge of plaintiff's possession. The evidence on this point was conflicting. As the court did find, however, that defendant owned this disputed tract, and that plaintiff had no right, title, claim or interest therein, the finding being against plaintiff and cross-defendant on his complaint, and in favor of cross-complainant, it was not necessary for the court to find on each probative fact set forth in the answer to the cross-complaint in support of his adverse claim. The court did find on the ultimate fact that the cross-defendant had no right, title, claim or interest in said particular tract. Wells v. B. F. Porter Estate, 205 Cal. 776, 272 P. 1039; Aries v. Squires, 105 Cal.App. 414, 287 P. 515; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737; City of Signal Hill v. Wyse, 9 Cal.App.2d 641, 50 P.2d 1076.

It is therefore apparent that the judgment in this case should be affirmed. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

---

33 Cal.App.2d 658

## SHELLEY v. HURWITZ et al.

Civ. 2336.

District Court of Appeal, Fourth District, California.

July 12, 1939.

Rehearing Denied Aug. 10, 1939.

Hearing Denied Sept. 6, 1939.

**1. Public lands** 🔑198

Under the Treaty of Guadalupe Hidalgo, the title to all California lands not held in private ownership passed to the government of the United States, but under the treaty, as well as by the law of nations, the United States was bound to protect private rights which had been acquired. Treaty of Guadalupe Hidalgo, 9 Stat. 922.

**2. Public lands** 🔑222

A patent issued by the United States government to a city pursuant to an act of Congress enacted after treaty of Guadalupe Hidalgo, setting up a tribunal to confirm the title to lands formerly held under law of Mexico, was conclusive evidence that land was not a part of the public domain, and confirmed the city's claim which had arisen under Mexican law, but it was not a concession or grant by the government, but simply an acknowledgment of an existing right. Treaty of Guadalupe Hidalgo, 9 Stat. 922; Act Cong. March 3, 1851, 9 Stat. 631.

**3. Public lands** 🔑217

An act of Congress enacted after treaty of Guadalupe Hidalgo, setting up a commission to confirm title to lands formerly held under law of Mexico and authorizing city to present claim both on behalf of itself and every lot owner deriving title from city was intended to aid lot holders who claimed title from authorities of a pueblo or town, or from an individual who was originally grantee of the land upon which the pueblo or town was built, and to obviate the necessity of commissioners considering a multitude of separate individual claims. Treaty of Guadalupe Hidalgo, 9 Stat. 922; Act Cong. March 3, 1851, and § 14, 9 Stat. 631, 634.

**4. Public lands** ⚷222

A patent issued by the United States government to a city pursuant to an act of Congress enacted after treaty of Guadalupe Hidalgo, setting up a commission to confirm title to lands formerly held under law of Mexico confirmed original title of city to lands, but was not a quitclaim deed, reconveying to city property which United States government prior to issuance of patent had purchased from a vendee of city. Treaty of Guadalupe Hidalgo, 9 Stat. 922; Act Cong. March 3, 1851, § 14, 9 Stat. 634.

**5. Quieting title** ⚷10(2)

In a quiet title action, generally, a plaintiff must trace his title to a patentee or at least to a grantor in possession, but this rule does not apply where both parties are relying upon a common source of title.

**6. Appeal and error** ⚷695(1)

In quiet title action, reviewing court would not reverse judgment for plaintiff on ground that he had failed to establish title to all property in question because of alleged invalidity of a partition deed, where both parties relied on conveyances by United States government made subsequent to partition deed as source of title, and where record did not contain all the evidence. 10 U.S.C.A. § 1594 et seq.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action to quiet title by Martha W. Shelley against Arthur M. Hurwitz, Isador Jacobson, and others. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Herbert C. Kelly and Milborne Bross, both of San Diego, for appellants.

Lindley & Higgins and J. F. Du Paul, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to a lot in the city of San Diego which was formerly a part of the pueblo lands acquired by that city as the successor of the Pueblo of San Diego. From a judgment in favor of the plaintiff the defendants appeal.

On March 18, 1850, Thomas W. Sutherland, as Alcalde of San Diego, deeded a certain tract to six persons. On July 17, 1850, and on September 12, 1850, partition deeds were executed purporting to divide all lots in this tract between the owners thereof, both deeds allotting the property here in controversy to one Jose Antonio Aguirre. On September 12, 1850, Aguirre quitclaimed this lot to the United States of America, which remained in possession thereof from 1850 to 1934, using it, in connection with other property, for barracks. In 1934, the United States sold the property to the respondent, pursuant to an act of Congress passed in 1926, 44 Stats. 203, 10 U.S.C.A. § 1594 et seq., giving her a quitclaim deed.

The appellants obtained a quitclaim deed to this lot from the city of San Diego on August 18, 1920, and in this action maintained that any interest in the property which the United States acquired through the deed from Aguirre was reconveyed to the city of San Diego by a patent issued on April 10, 1874.

[1] Under the treaty of Guadalupe Hidalgo, 9 Stat. 922, the title to all lands in California not held in private ownership passed to the government of the United States. Under that treaty, as well as by the law of nations, the United States was bound to protect private rights which had been acquired. Under an act of Congress passed on March 3, 1851, 9 Stats. 631 (U.S.), suitable provision for this was made by a tribunal thus established and, with the assistance of the courts, such claims of title were to be considered and when allowed were to be confirmed by a patent. Pursuant to this act, on February 14, 1853, the city of San Diego on behalf of itself and of all persons to whom it had conveyed, presented to the board of commissioners thus established its claim to such pueblo lands. A decision was rendered on January 28, 1856, confirming the city's title, which was affirmed on appeal. Pursuant thereto, the patent above referred to was issued by the United States to the city on April 10, 1874. This patent recites that a petition had been filed pursuant to the act of 1851 asking

confirmation of title to these pueblo lands, that the board of commissioners had rendered a decree of confirmation in favor of the claimant, and that this patent was given pursuant to the provisions of the act.

The main question presented is as to the effect of this patent upon the title to this lot which the United States had theretofore acquired by deed from a vendee of the city. The appellants contend that it had the effect of a quitclaim deed and that in addition to confirming the title which the city of San Diego had acquired as the successor of the Pueblo of San Diego, it also conveyed any interest which the United States then held, including any interest acquired from those to whom the city had conveyed. On the other hand, the respondent contends that this patent merely confirmed the original rights of the city as successor in interest to the Pueblo; that under the treaty, the act of Congress and the patent the rights of previous purchasers from the city were protected and confirmed; that the rights of the government as successor to vendees of the city were likewise confirmed; and that the patent did not reconvey or transfer to the city any title or interest with which the city had already parted.

The appellants cite and rely upon a number of cases in which such a patent is referred to as having the effect of a quitclaim, as being conclusive against the government, and as being equally conclusive against parties claiming under the government by title subsequent. Beard v. Federy, 70 U.S. 478, 3 Wall. 478, 18 L.Ed. 88; Knight v. United Land Ass'n, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974; United States v. Coronado Beach Co., D. C., 274 F. 230; Thompson v. Los Angeles Farming & Mill. Co., 180 U.S. 72, 21 S.Ct. 289, 45 L.Ed. 432; De Guyer v. Banning, 167 U.S. 723, 17 S.Ct. 937, 42 L.Ed. 340. The point relied upon by the appellants is sufficiently set forth in the case of Beard v. Federy, supra. In that case, the court said [70 U.S. 478, 491, 18 L.Ed. 88]:

*"In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land;* and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. * * *

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. * * By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. * * * By it the government declares that the claim asserted was valid under the laws of Mexico * * * *As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent.* It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor." (Italics ours.)

[2] While the opinion in that case states that such a patent is a conveyance of such interest as the United States possessed in the land it is also pointed out that the patent is issued by way of confirmation of a claim arising under the laws of Mexico, that by the patent the government declares that the claim asserted was valid under the laws of Mexico, and that such a patent is conclusive evidence of the validity of such a claim under the laws of Mexico, both as against the government and as against parties claiming under the government by title subsequent. There was no granting clause in the act of March

3, 1851, and nothing therein authorizing the granting of any title through the machinery therein provided for or through the patent which was to be issued. It was pointed out in Phillips v. Mound City L. & W. Ass'n, 124 U.S. 605, 8 S.Ct. 657, 31 L.Ed. 588, that by the patents issued in pursuance to that act the United States invested the patentees with the legal title which had passed under the treaty from the Mexican government to that of the United States, and that the patents are conclusive with respect to such title. As was said in Rodriquez v. United States, 68 U.S. 582, 1 Wall. 582, 588, 17 L.Ed. 689: "The primary object of the Act [of March 3, 1851] was to ascertain and separate the public domain from that which had become, under the Mexican Government, private property." This patent was conclusive evidence that this land was not a part of the public domain and it confirmed the city's claim which had arisen under Mexican law. As evidence of such confirmation it conveyed the legal title which had by treaty passed to the United States government. While it was conclusive as against any title acquired by the United States under the treaty, and as against any claim which the United States might assert in opposition to and in disregard of such title, it does not follow that it was conclusive as against a title which the government had acquired through conveyances from the patentee and in full reliance upon the validity of the patent and the rights which it confirmed. While the land was no longer a part of the public domain the government, like an individual, could acquire title thereto from the patentee or from one to whom the patentee had sold it. The only difficulty in this case arises from the fact that such a title had been acquired by the government before the patent was issued. Because of this fact it is now claimed that the patent had the effect of a quitclaim deed and not only confirmed the previous title of the city but also reconveyed to the city a part of this land which the city had in good faith sold, and this merely because the purchasers from the city had sold to the government before the patent was issued, which was more than twenty-five years after the city's title had originated.

Certain cases throw some light upon our present problem. In Hart v. Burnett, 15 Cal. 530, it is pointed out that the effect of such a patent covering public lands is not a concession or grant by the government but simply an acknowledgment of an existing right. It is there said:

> "The result of this reasoning is, that upon this hypothesis, independently of all original claims of the city to the grant of lands to the old pueblo, her predecessor, she has the title to them, not by a concession of the lands by the Federal Government, but by a concession by that Government of such a state of proofs of an anterior title, as establishes such title against that Government, the only other claimant. But she stands on this title, not as a title *granted* by the Federal Government, but as a title acknowledged by that Government."

[3] In Leese v. Clark, 18 Cal. 535, in discussing the fourteenth section of the act of 1851, which authorized the city to present a claim both on behalf of itself and every lot owner deriving title from the city, the court said: "The evident object of this section was to aid lot holders who claimed title from a common source—from the authorities of a pueblo or town, or from an individual who was originally the grantee of the land upon which the pueblo or town was built—and to prevent the necessity on the part of the Commissioners of considering a multitude of separate individual claims for small tracts, all of which depended upon the validity of the same original title. The confirmation of the common title in such cases would of course inure to the benefit of all parties holding under the claimants, for between them there would exist privity of estate."

In Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 29 S.Ct. 493, 494, 53 L.Ed. 822, the court, speaking through Mr. Justice Holmes, said: "The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, but releases that of the United States (Beard v. Federy, 3 Wall. 478, 491, 18 L.Ed. 88, 92), and that, by the grant from the United States, it gained rights as a riparian proprietor that could not be displaced by a subsequent attempt to appropriate the water (Sturr v. Beck, 133 U.S. 541, 10 S.Ct. 350, 33 L.Ed. 761). But, while it is true that in Beard v. Federy, supra, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. * * * It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign, it intends or purports to enlarge the grant."

In Los Angeles Farming & Milling Co. v. Los Angeles, 217 U.S. 217, 30 S.Ct. 452, 459, 54 L.Ed. 736, it is said: "And whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty."

[4] We think it follows that the patent here in question did not have the effect of a quitclaim deed in the sense here contended. It merely confirmed the rights which had accrued to the city as the successor of the pueblo. While it confirmed those rights it did not purport to cover or affect rights which the city had already conveyed to individuals and which had, in turn, been conveyed by them to the United States. Section 14 of the act of 1851, 9 Stat. 634, provided that the rights of individuals to whom the city had conveyed should be covered and protected by the application for confirmation made by the city. This was here done and the patent issued inured to the benefit of such vendees. As the successor of such vendees the title of the government was also confirmed. As a purchaser from the government the respondent here is not attacking the patent which was issued but is relying upon it. While the patent was conclusive evidence that the land was not a part of the public domain, nothing therein or in the proceeding upon which it was based made it effective as conveying the title which the government had acquired from grantees of the city. The entire proceeding which gave rise to the patent was designed to and did pass upon the original title as of the time when the land was ceded to the United States, and as to whether the land had become a part of the public domain, but it was not designed to and did not adversely affect the rights and titles of those to whom the city had conveyed and their successors in interest. While the patent in question confirmed the city's original title it cannot be interpreted as having given back to that city a title to lots which had already been conveyed by the city to others. The entire proceedings leading up to the patent were designed to settle such land titles as those which were here claimed by and confirmed in the city, including the rights of the city's vendees for whom it also acted, and it was never intended that the very act of confirming the title of the city's vendee should have the effect of destroying such titles and reconveying such property to the city.

[5, 6] The appellants further contend that, in any event, the respondent failed to establish her title to all of the lots in question. It is argued that the partition deeds of July 17, 1850, and September 12, 1850, were invalid, that the deed from Aguirre to the United States therefore conveyed only his one-sixth interest in the property, and that the deed from the United States to the respondent could convey no more. Ordinarily a plaintiff in a quiet title action must trace his title to a patentee or at least to a grantor in possession. A recognized exception exists where both parties are relying upon a common source of title. Sorensen v. Hall, 219 Cal. 680, 28 P.2d 667; Central Nat. Bank v. Bell, 5 Cal.2d 324, 54 P.2d 1107; Berte v. Luse, 216 Cal. 251, 13 P.2d 910. The respondent here relies upon a deed from the United States. While one of the appellants' predecessors was the city of San Diego, since that city had previously conveyed the property it became and was necessary for the appellants to establish that the city had subsequently acquired title, if they were to prevail in the action. To this end and to establish the fact that title had been reconveyed to the city they rely upon the patent issued in 1874 and their entire claim to the property depends upon the meaning and effect of that patent. It thus appears that they are relying, in this action, upon what they claim is a conveyance from the United States. A further consideration is that all of the evidence is not before us. The bill of exceptions describes certain instruments which were received in evidence and states that it was stipulated that the plaintiff was in possession of the property. It neither professes to summarize all of the evidence received nor states that none was received other than that which is set forth. The government was in possession of the property for some eighty years and any defects in its title may have been cured by evidence sufficient to establish title by adverse possession.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

## HAYS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. *

Civ. 12259.

District Court of Appeal, Second District, Division 1, California.

July 14, 1939.

Hearing Granted Sept. 11, 1939.

**1. Courts ⇨207(4)**

Under the Constitution, a District Court of Appeal has jurisdiction of a petition for writ of mandate to a superior court, notwithstanding that action out of which proceeding arose is appealable directly to Supreme Court, but as a matter of practice both the Supreme Court and District Courts of Appeal refrain from taking jurisdiction when the cause involved was one originally appealable to the other court. Const. art. 6, § 4.

**2. Courts ⇨207(4)**

Where sole issue on appeal to Supreme Court was whether superior court abused its discretion in dismissing action for lack of prosecution, and the only question involved in proceeding for writ of mandate before District Court of Appeal was plaintiff's right to compel a defendant to give her deposition while case was on appeal to Supreme Court during time the deposition proceeding was pending in the superior court, District Court of Appeal was not thereby deprived of jurisdiction to issue writ of mandate. Const. art. 6, § 4.

**3. Appeal and error ⇨442**

In view of section of Code providing that, on perfection of appeal to Supreme Court or to District Court of Appeal, there shall be a stay of all proceedings on judgment or order appealed from or matters embraced therein, but that superior court may nevertheless proceed on any other matter embraced in the action and not affected by order appealed from, superior court had power to order the taking of a deposition of a defendant, notwithstanding that an appeal was pending from an order of dismissal. Code Civ.Proc. §§ 946, 2021.

**4. Mandamus ⇨40**

The fact that petitioner, whose action in superior court had been dismissed and who had appealed to Supreme Court from order of dismissal, had filed another action in superior court against same defendant whose deposition in appealed case was sought to be taken, would not preclude District Court of Appeal from issuing writ of mandate to compel superior court to order taking of the deposition, where there was no showing that such defendant had either been served with summons or had appeared in subsequent action. Code Civ.Proc. § 2021.

**5. Appeal and error ⇨442**

Where plaintiff had obtained subpœna directing a defendant to give her deposition, plaintiff had a right to the direction by the superior court that proper questions should be answered by that defendant, notwithstanding that appeal to Supreme Court from order of dismissal was pending, so as to make preparations for a trial of the action in event order of dismissal should be reversed on appeal. Code Civ.Proc. § 2021.

**6. Depositions ⇨8**

Though the right to take a deposition may not be absolute, but must be taken with such qualifications as the facts of each case may demand, those qualifications are restricted to cases where issuance of order or commission would be an idle act. Code Civ. Proc. § 2021.

**7. Depositions ⇨2**

The statute dealing with the taking of depositions should be liberally construed. Code Civ.Proc. § 2021.

◆

Proceeding for writ of mandate by Jack Hays against the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable Robert H. Scott, Presiding Judge thereof, to compel the respondents to order that one of the defendants, in an action in which the petitioner was a plaintiff, give her deposition.

Peremptory writ issued.

William C. Ring, of Los Angeles, for petitioner.

John H. O'Connor, Co. Counsel, Douglas De Coster, Asst. Co. Counsel, Loyd Wright and Charles E. Millikan, all of Los Angeles, for respondent Superior Court.

WHITE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court "to order the said Gertrude Temple to give her deposition". The material facts to be considered are that there was pending in respondent court an action in which petitioner herein appeared as plaintiff and in which

---

*For subsequent opinion see 100 P.2d 1050.

Gertrude Temple and G. F. Temple were named defendants and duly filed their answer therein. On March 14, 1939, the defendants in said action served and filed a notice of motion to dismiss the same on the ground that it had not been brought to trial within two years from the commencement thereof. The motion to dismiss was noticed for and actually heard on March 22, 1939, at which time the respondent court made its order granting the same. From such ruling petitioner herein as plaintiff duly appealed to this court, and at the time of the filing of this petition for writ of mandate herein, the proposed bill of exceptions was awaiting settlement by respondent court.

Subsequent to the filing of the notice of motion to dismiss, but prior to the ruling thereon, petitioner herein, as plaintiff in the aforesaid pending action, obtained from respondent court, the issuance of a subpoena requiring Gertrude Temple, one of the defendants therein, to appear and give her deposition on March 30, 1939. On March 29, and after the minute order was made granting the motion to dismiss, the defendant Gertrude Temple obtained an order of the court continuing the time for the taking of her deposition to April 8. On the last-named date Mrs. Temple appeared at the appointed time and place, but acting on the advice of her counsel, refused to be sworn or give any testimony as a witness, on the stated ground that the proceedings for the taking of her deposition having been commenced prior to the dismissal of the action by the court, and such proceedings for the taking of her deposition having been then pending, they were fully and completely terminated by and through the dismissal of the action. Thereafter the petitioner herein caused to be filed in respondent court the certificate of the designated notary public, reciting the foregoing facts and proceedings and reporting to respondent court the refusal of said Gertrude Temple to be sworn as a witness or to give her deposition, and contemporaneously therewith sought from respondent court its order and subpoena commanding and directing said Gertrude Temple to give her deposition. In denying the requested order, respondent court made the following minute entry on its records:

"This matter comes before the Court on an ex parte application of plaintiff for an Order to Show Cause why Gertrude Temple should not give deposition. The proposed order is refused because the case has been dismissed, and the judgment pursuant to the order of dismissal is now pending on appeal, and that the taking of such deposition should be deferred until determination of said appeal, for the convenience of the parties and in the interests of justice; the Court having read and considered only the certificate of Notary Public, Memorandum of Points and Authorities, a copy of affidavit of Wm. C. Ring, copy of Notice to Take Deposition, copy of Subpoena re Deposition, and Affidavit of Service of same."

[1, 2] To our alternative writ heretofore issued respondent appears by demurrer and answer, contending first that the action out of which this proceeding arose was and is appealable directly to the Supreme Court (art. VI, sec. 4, Const. Calif.), and that by reason thereof this court should refuse to take jurisdiction or issue a writ of mandate herein. Indisputably, this court has jurisdiction to issue such writ; but it has been and is a matter of practice and policy that where cases were in the superior court, both the Supreme Court and District Courts of Appeal have refrained from taking jurisdiction when the cause involved was one originally appealable to the other court. Favorite v. Superior Court, 181 Cal. 261, 265, 184 P. 15, 8 A.L.R. 290; Collins v. Superior Court, 147 Cal. 264, 81 P. 509; Estate of Turner, 39 Cal.App. 56, 177 P. 854. If, therefore, by granting the petition now before us questions involved in the appeal when it comes before the Supreme Court would necessarily be determined by this court, we would undoubtedly invoke the rule just mentioned. But such is not the case here. The sole issue upon the appeal is whether or not the trial court abused its discretion in dismissing the action for lack of prosecution, while the only question involved in the proceeding before us is the right of petitioner to compel Mrs. Temple to give her deposition while the case is on appeal after the dismissal order made while the deposition proceeding was pending in the trial court. Whatever action we here take cannot in any manner affect or concern the appellate tribunal reviewing the question presented on the main appeal.

[3] The next ground urged by respondent is that the dismissal of the action which gave rise to this proceeding, at a time when the proceeding for the taking of the

deposition was pending, had the necessary effect and result of terminating all the pending proceedings in the dismissed action, including all proceedings and process incidental to the taking of Mrs. Temple's deposition. In this contention respondent cannot be sustained, for it is expressly provided by section 946 of the Code of Civil Procedure that upon the perfection of an appeal to the Supreme Court or this court and the stay of all proceedings upon the judgment or order appealed from and matters embraced therein, the superior court may nevertheless "proceed upon any other matter embraced in the action and not affected by the order appealed from". In San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 34, 99 P. 359, 360, 17 Ann.Cas. 933, it was held that the language of section 2021 of the Code of Civil Procedure is "very sweeping and comprehensive, and clearly includes, if taken literally, all the time *that an action is pending,* that is to say, all the time from the service of summons or the appearance of the defendant until 'its final determination upon appeal or until the time for appeal has passed unless the judgment is sooner satisfied (Code Civ.Proc., § 1049).'" (Emphasis added.) Therefore, without doubt the superior court under the facts of the instant case possessed the right and power to order the taking of the deposition of a defendant therein, and if the court possessed such power it certainly also possessed the power to compel a party defendant to give her deposition after judgment of dismissal upon an order theretofore issued, and such power continues until the final determination of the pending appeal.

[4] It is next urged by respondent that no reason or necessity exists for the issuance of a writ of mandate because petitioner herein has filed a new action in the superior court of Los Angeles county naming Gertrude Temple as one of the defendants, and in which said action the same contract and cause of action is sued upon as in the case which gave rise to the proceeding now before us. This claim is unavailing, for it is not here claimed, nor is there any showing by respondent, that defendant Mrs. Temple either has been served with summons or has appeared in the subsequent action so as to entitle plaintiff herein to take her deposition. (Code Civ.Proc., sec. 2021.) The statute confers upon either party to a lawsuit the right to take the other's deposition in any pending action after service of the summons or appearance therein, and the existence of a kindred action involving in whole or in part the same parties and subject-matter does not operate as a bar to the exercise of that right.

[5-7] Finally, respondent earnestly insists that the trial court is not compelled under all circumstances to order the issuance of a subpoena or commission to take a deposition, at any time a request is made therefor, and that the trial court may exercise its discretion and refuse the issuance thereof under certain circumstances; and further, that it is not an abuse of such discretion for a trial court to refuse to order a party to appear and give her deposition when, as here, an action has been dismissed. While this contention would seem to find support in the case of Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283, it is noteworthy that no petition for hearing in the Supreme Court was filed in the cited case; but in the cases of San Francisco Gas & Electric Co. v. Superior Court, supra, decided by the Supreme Court, and Most v. Superior Court, 25 Cal.App.2d 394, 77 P.2d 532 (hearing denied by the Supreme Court), it was decisively held that it does not rest in the discretion of the trial court or judge to refuse a commission in the cases defined by the code. Therefore, where, as here, petitioner had obtained the subpoena directing Mrs. Temple to give her deposition, he had a right to the direction of the superior court that proper questions should be answered by her with a view to making preparations for a trial of the action in the event the order of dismissal is reversed on appeal. The right just mentioned is not a matter affected by the judgment appealed from. Conceding, as was decided in Levin v. Superior Court, 139 Cal.App. 693, 34 P.2d 832, that the right to take a deposition is not absolute, but must be taken with such qualifications as the facts of each case may demand, those qualifications are restricted to cases where the issuance of the order or commission would be an idle act, something the law never requires. Such, for instance, as was pointed out in the last-cited case, where the application for the commission is made at a date so late before the trial that the deposition could not be taken in time to be used, and where the granting of a continuance of the trial date in order to take the deposition

would prejudice the rights of others. No such reason or contingency is made apparent to us in the instant proceeding. The liberal construction of section 2021 of the Code of Civil Procedure is undoubtedly inspired by the policy of the law that when litigation is finally determined it shall result in justice being done, for which reason the law is liberal in the means it affords to perpetuate testimony, to the end that all reasonable opportunity be afforded the parties to present a legitimate claim or defense if one exists.

It seems clear that the respondent court in this present matter had no discretion to refuse the order which petitioner sought to compel the witness Gertrude Temple to appear and give her deposition.

The demurrer is overruled and the peremptory writ will issue as prayed for.

I concur: DORAN, Acting P. J.

---

33 Cal.App.2d 666

## FRESNO CITY HIGH SCHOOL DIST. v. DE CARISTO.

Civ. 2253.

District Court of Appeal, Fourth District, California.

July 12, 1939.

Hearing Denied Sept. 6, 1939.

**1. Schools and school districts 🔑141(5)**

In school district's action for permission to dismiss permanent teacher, allegations of complaint and issues tried and determined by superior court should be confined to and limited by written charges in school board's notice of intention to dismiss such teacher. School Code, § 5.654, as amended by St.1937, p. 1629.

**2. Statutes 🔑206**

Every clause and word of statute should be given effect and meaning where possible. Code Civ.Proc. § 1858.

**3. Statutes 🔑206**

In construing component parts of legislative act, court should give force and effect to each where possible.

**4. Schools and school districts 🔑141(4)**

Words and phrases in act stating grounds for permanent teacher's dismissal were employed by Legislature in sense and with such meaning that each ground refers to acts or omissions not necessarily included in the others. School Code, § 5.650, as amended by St.1935, p. 1885.

**5. Schools and school districts 🔑141(2)**

A statute authorizing termination of permanent teacher's valuable right to continue in employment should be strictly construed. School Code, § 5.650, as amended by St.1935, p. 1885.

**6. Statutes 🔑230**

Where two code sections containing same word are amended by same enactment, court is ordinarily inclined to hold that Legislature intended to give same meaning to such word in each section.

**7. Statutes 🔑147**

The court must presume that Legislature intended to change statute, authorizing permanent teacher's removal for incompetency, by amendment inserting after word "incompetency" words "other than incompetency due to physical or mental disability," as amendment to statute is usually designed to add something to it or limit its effect. School Code, §§ 5.650, 5.652, as amended by St.1935, pp. 1885, 1886.

**8. Schools and school districts 🔑141(5)**

In amendatory statute, inserting words, "other than incompetency due to physical or mental disability," after word "incompetency" in section of statute requiring 90 days' notice of incompetency to teacher sought to be removed on such ground, word "incompetency" is used in broad sense, not in restricted meaning of lack of educational qualifications or ability to transmit knowledge to pupils as employed in section stating grounds for removal. School Code, §§ 5.650, 5.652, as amended by St.1935, pp. 1885, 1886.

[Ed. Note.—For other definitions of "Incompetent; Incompetency," see Words & Phrases.]

**9. Statutes 🔑188**

Words and phrases in statute must be given their ordinary and popular meaning, unless Legislature apparently intended that different construction be placed thereon.

**10. Schools and school districts 🔑141(5)**

The section of School Code prohibiting school board from acting on charges of teacher's incompetency, not due to physical or mental disability, without giving him written notice, specifying nature of incompetency with such particularity as to furnish him opportunity to correct his faults and overcome his incompetency, at least 90 days before date of filing charges, requires school board to give permanent teacher charged with incompetency 90 days' notice of such of her faults as may be corrected and overcome within such time before taking action to dismiss her. School Code, §§ 5.651 to 5.654.

**11. Schools and school districts ⟹141(5)**

A permanent high school teacher's failure to familiarize herself with school board's rules and regulations and preserve order and discipline in her class rooms, absences from school without consent, and refusal to allow substitute to act in her place, as charged in notice of intention to dismiss her, were faults which might be corrected and overcome, so as to require 90 days' notice thereof before taking action to dismiss her. School Code, §§ 5.650, 5.652, as amended by St.1935, pp. 1885, 1886.

**12. Schools and school districts ⟹141(5)**

Paragraphs of school board's notice of intention to dismiss permanent teacher for failure to familiarize herself with board's rules and regulations and preserve order and discipline in class rooms were insufficient, in absence of any intimation therein that such faults were persistent. School Code, § 5.650, as amended by St. 1935, p. 1885.

**13. Schools and school districts ⟹141(5)**

A school board's notice of intention to dismiss permanent teacher on charge of absenting herself from school without leave on two occasions was insufficient, in absence of statement that such absences were not caused by sickness. School Code, § 5.650, as amended by St.1935, p. 1885.

**14. Appeal and error ⟹843(2)**

A charge in school board's notice of intention to dismiss permanent teacher and superior court's finding that accused refused to let substitute act in her place in violation of board's rule may be disregarded on appeal from judgment permitting board to dismiss such teacher, where portion of rule before Court of Appeal does not touch on such refusal. School Code, § 5.650, as amended by St.1935, p. 1885.

**15. Schools and school districts ⟹141(4)**

Two absences from school by permanent teacher without leave do not constitute persistent course of conduct authorizing her removal for violation of or refusal to obey school board's rules and regulations. School Code, § 5.650, as amended by St.1935, p. 1885.

**16. Schools and school districts ⟹141(5)**

A permanent school teacher's quick temper and uncontrolled tongue are correctible faults within statute requiring school board to give teacher 90 days' notice of such faults before taking action to dismiss her. School Code, §§ 5.650, 5.652, as amended by St.1935, pp. 1885, 1886; § 5.654, as amended by St. 1937, p. 1629.

**17. Appeal and error ⟹907(3)**

On appeal on judgment roll, Court of Appeal must assume, in support of regularity of judgment appealed from, that trial court's findings, on which judgment is based, are supported by sufficient evidence.

**18. Schools and school districts ⟹141(5)**

A high school district board's failure to give permanent teacher 90 days' notice of correctible faults before giving notice of intention to dismiss her is fatal to board's action for permission to dismiss her. School Code, §§ 5.650, 5.652, as amended by St.1935, pp. 1885, 1886; § 5.654, as amended by St. 1937, p. 1629.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by the Fresno City High School District against Marietta De Caristo for permission to dismiss, and terminate employment of, defendant as a permanent teacher in such district. Judgment for plaintiff, and defendant appeals.

Reversed.

Robert M. Barnard and Kenneth G. Avery, both of Fresno, for appellant.

Dan F. Conway, Dist. Atty., and W. C. Tupper, Asst. Dist. Atty., both of Fresno, for respondent.

MARKS, Acting Presiding Justice.

This is an appeal from a judgment permitting respondent to dismiss appellant and to terminate her employment as a permanent teacher in the Fresno City High School District.

On December 9, 1937, respondent prepared and had delivered to appellant by United States mail the following notice:

"Notice of Intention to Dismiss Employee.

"The Board of Education of the Fresno City High School District charges that there exist the following causes for your dismissal as an employee of said District, to-wit:

"1. That in violation of Subdivision 1 of Section IXa of the Rules and Regulations of said Board of Education, you have failed to familiarize yourself with said rules and regulations.

"2. That in violation of Subdivision 2 of Section IXa of the Rules and Regulations of said Board of Education, you have failed to preserve order and discipline in your classrooms.

"3. That in violation of subdivision 5 of Section IXa of the Rules and Regulations of said Board of Education, you, on October 6, 1937, and on October 21, 1937, absented yourself from school without consent and that further, in violation of said Subdivision, you, on October 22, 1937, requested a substitute and later on said date, to-wit: October 22, 1937, refused without proper grounds therefor to allow a substitute to act after one had been assigned in your place.

"4. That you have committed acts of unprofessional conduct, in that you have in the presence and hearing of pupils in the school started disputes with other teachers and severely criticized them.

"5. That for the causes above stated, you are evidently unfit for service, and for the further reason that you do not properly conduct yourself in the presence and hearing of pupils in and out of your classrooms, and in this connection you fly into fits of temper and rage and make unwarranted statements of abuse of pupils and teachers; that you, without cause or justification, accused the Superintendent, Principal and teachers of attempting to and persecuting you, and have made statements to such effect publicly to others.

"Wherefore, you are hereby notified that for the causes and reasons above stated and set forth, the undersigned intend to dismiss you at the expiration of thirty days from the date of service hereof.

"Dated this 9th day of December, 1937.

"Board of Education of the Fresno City High School District
"By G. L. Aynesworth (Signed)
"President
"By L. L. Smith (Signed)
"Secretary

"The following Code Sections are herewith made a part of this:

"School Code, State of California, Article II, Section 5.650-5.651-5.652-5.653-5.654-5.661-5.664-5.665-5.666-5.667."

On January 5, 1938, appellant filed a written demand for a hearing on the charges stated in the notice. Her demand reserved to her the right to object to the sufficiency of the notice and the sufficiency of its service on her.

This action was thereafter instituted by the school district within the time required by law. Sec. 5.654, School Code. After a trial on the merits the trial judge found the charges true and entered its judgment authorizing the dismissal of appellant.

[1] Section 5.654 of the School Code, as amended by St.1937, p. 1629, provides that if the teacher so demands, the school board shall either rescind the charges made or "file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against such employee and asking that the court inquire into such charges and determine whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings".

It is rather clear from the foregoing quotation that the sole duty of the court is to try the sufficiency of the written charges as made and to determine whether or not the evidence supports those written charges and justifies the dismissal of the teacher. The charges are, in effect, the complaint of the school board against the teacher. They inform her of the grounds upon which the school board expects to remove her as a permanent teacher. She should be called upon to answer those charges and no others. Clearly, the allegations of the complaint and the issues to be tried and determined by the superior court should be confined to and limited by those written charges. It is apparent from the quoted portion of the code section that the action brought by the school district can have no other purpose than a determination of the legal sufficiency of those charges, their truth or falsity, and their sufficiency to justify a dismissal. The powers of the judge presiding in such a case should be limited to those issues. Ordinarily his findings should not go beyond them.

In our consideration of this case we will confine ourselves to a discussion of the sufficiency of the procedure followed by the school board, the sufficiency of the written charges filed, and the sufficiency of the findings of fact to support the judgment.

The grounds for the dismissal of a permanent teacher are found in section 5.650 of the School Code, as amended by St.1935, p. 1885, which provides as follows: "No permanent employee shall be dismissed except for one or more of the following causes: immoral or unprofessional conduct, commission or aiding or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188, Statutes of 1919, or in any amendment thereof, dishonesty, incompetency, evident unfitness for service, physical or mental condition unfitting him to instruct and/or associate with children, persistent violation of or refusal to obey the school laws of California, or reasonable regulations prescribed for the government of the public schools, by the State Board of Education or prescribed by the governing board of the school district employing said employee, or conviction of a felony or of any crime involving moral turpitude."

The written charges in this case attempt to specify some or all of the following grounds for the removal of appellant: "unprofessional conduct, * * * incompetency, evident unfitness for service, * * * persistent violation of or refusal to obey the * * * reasonable regulations prescribed for the government of the public schools * * * by the governing board of the school district employing said employee".

Section 5.650 of the School Code states eleven separate grounds upon which a permanent teacher may be discharged from her employment. It provides that she may be removed upon being found guilty of sufficiently violating any one or several of the provisions of the section.

The generally accepted definitions of the words and phrases which constitute each separate ground of removal overlap so that if the legislature intended that such definitions be given to the words and phrases it used in the section, the same act or omission on the part of a teacher would be a ground for removal under several of its separate subdivisions.

If we use the broad definitions of the terms employed, a teacher who is in a "physical or mental condition unfitting him to instruct" would show "incompetency" to teach and would also show "evident unfitness for service". The section is repetitious and redundant, if we employ such definitions of the terms used.

An examination of the several words and phrases used in the section to establish each separate ground for removal discloses that each refers to some act or omission not necessarily included in any of the others. Thus "incompetency" could be held to refer to lack of educational qualifications, or, possessing them, lack of ability to transmit knowledge to pupils. "Evident unfitness for service" could refer to temperamental defects or inadequacies. "Physical or mental conditions unfitting him to instruct" could refer to physical weakness or disease, or mental deterioration. The use of the word "condition" in this phrase would indicate a reference to physical disease or a mental weakness that is pathological and of some permanence and not of temporary duration. These suggested definitions are given for the purpose of illustration and are not intended to be all-inclusive.

[2, 3] It is a cardinal rule of construction that, where possible, every clause and word of a statute should be given effect and meaning. Sec. 1858, Code Civ.Proc.; Smith v. State Board of Control, 215 Cal. 421, 10 P.2d 736; County of Los Angeles v. Graves, 210 Cal. 21, 290 P. 444; Crowe v. Boyle, 184 Cal. 117, 193 P. 111; Gill v. Johnson, 103 Cal.App. 234, 284 P. 510; Cory v. Cooper, 117 Cal.App. 495, 4 P.2d 581. It is equally true that in construing the component parts of a legislative act the courts should, where possible, give force and effect to each so that the whole act may have life and vitality. Ahern v. Livermore Union H. S. Dist., 208 Cal. 770, 284 P. 1105; In re Haines, 195 Cal. 605, 234 P. 883; People v. Rabe, 202 Cal. 409, 261 P. 303.

[4, 5] In order to give each word or phrase of the section effect and meaning and life and vitality we must conclude that the legislature intended to and did employ words and phrases in the sense, and with such a meaning, that each of the eleven stated grounds for removal refer to acts or omissions not necessarily included in the others. This is so because the section makes each separate ground of removal a sufficient cause for the discharge of a permanent teacher. A cause of action for removal is stated by charging an act or omission which falls within only one ground of

removal. If the act charged falls within two or more grounds, the accusation could not charge a single offense, that is a single ground of removal, under one subdivision of the section. Further, the statute in question has as its object the termination of a valuable right of a permanent teacher, that of being continued in her employment. Such a statute should be strictly construed. Woods-Drury, Inc., v. Superior Court, 18 Cal.App.2d 340, 63 P.2d 1184.

With these rules of law and this construction of section 5.650 of the School Code in mind we must next consider section 5.652 of that code and its effect on these proceedings. That section provides as follows: "Governing boards of school districts shall not act upon any charges of incompetency, other than incompetency due to physical or mental disability unless during the preceding term or half school year prior to the date of the filing of such charge, and at least ninety days prior to the date of such filing, the board or its authorized representative shall have given the employee against whom the charge is filed, written notice of such incompetency, specifying the nature thereof with such particularity as to furnish the employee an opportunity to correct his faults and overcome his incompetency."

[6, 7] Sections 5.650 and 5.652 of the School Code were amended and recast by a single legislative act in 1935. Stats.1935, p. 1885, 1886. Ordinarily where two code sections containing the same word are amended by the same enactment we would be inclined to hold that the legislature intended to give the same meaning to that word in each section. This ordinarily would be true of the word "incompetency", used in the two sections we are considering. However, in its 1935 amendment to section 5.652 of the School Code the legislature inserted after the word "incompetency", the words "other than incompetency due to physical or mental disability". We must presume that by inserting this phrase the legislature had the intent to change the then existing statute (People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811) as an amendment to a statute is usually designed to either add something to it or to limit its effect. Mason v. Buck, 99 Cal. App. 219, 278 P. 461.

[8, 9] The 1935 amendment to section 5.650 showed no intent on the part of the legislature to change the prior meaning of the word "incompetency" as used in that section. The adding of the quoted phrase to section 5.652 shows a clear intent to change and enlarge the definition of that word as used in that section.

Before 1935, there was nothing to indicate that the legislature intended a different definition for "incompetency" as used in one section from that intended by its use in the other. After the 1935 amendment the meaning of the word in section 5.650 remained the same, while in section 5.652 it was given a much broader meaning and by direct enactment was made to apply to a separate ground of removal other than the "incompetency" specified in section 5.650. Therefore, we must conclude that in the 1935 amendment of section 5.652 the legislature used the word "incompetency" in its broad sense and not in the restricted meaning employed in section 5.650. This is true because words and phrases in a statute are to be given their ordinary and popular meaning unless it appears that the legislature intended that a different construction be placed upon them. 23 Cal.Jur. 730.

[10] The purpose of section 5.652 of the School Code is to enable a permanent teacher to remedy correctible faults or defects that might be corrected in ninety days and thus prevent discharge. This is in harmony with the entire purpose of the teachers' tenure act which is to insure an efficient permanent staff of teachers for our schools whose members are not dependent upon caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well.

We believe that section 5.652 of the School Code requires the school board to give the accused permanent teacher ninety days' notice of those of her faults which may be corrected and overcome within that time before taking the action to dismiss her in thirty days as contemplated in sections 5.651, 5.653 and 5.654 of the School Code. While this question was not before the court in Board of Education v. Ballou, 21 Cal.App.2d 52, 68 P.2d 389, the procedure followed there was in accordance with the views just expressed.

It is rather clear that the stigma of recognized immorality, known dishonesty, conviction of a felony or of a crime involving moral turpitude, or of guilt of criminal syndicalism or sedition could not be removed by ninety days' good behavior. From this we do not wish to imply that all of the other faults mentioned in section 5.650 of the School Code (among them a diseased condition of body or mind) may be correctible.

With this conclusion in mind we must consider the notice of intention to dismiss appellant and determine its sufficiency and whether or not the faults, or any of them, there specified were correctible so as to require notice of those faults and the lapse of ninety days' time within which to correct them before giving the notice leading to actual dismissal.

[11] It is obvious that the first three specifications of faults in the notice were intended to fall under the provisions of section 5.650 dealing with "persistent violation of or refusal to obey * * * reasonable regulations prescribed for the government of the public schools * * * by the governing board of the school district employing" appellant. This subdivision of the section certainly deals with correctible faults. Such violations may spring from many causes including ignorance of the rules and regulations through lack of opportunity to study them. That kindly admonition and advice by a superior may cause a correction of such deficiencies goes without saying.

[12] Further, the first three paragraphs of the notice of intention to dismiss are insufficient under section 5.650 of the School Code. That section provides that the violation of or refusal to obey the rules and regulations must be *persistent*. There is no intimation in either of the first two paragraphs that the faults there specified were persistent. The third paragraph specifies three purported violations of subdivision two of section IXa of the rules and regulations of the school board.

[13] Two of those violations relate to absences, without leave, from school on October 6th and on October 21, 1937. That rule prohibited a teacher from absenting herself from her scholastic duties without permission "except in case of sickness". The notice of dimissal does not state, the amended complaint does not allege, and the findings of fact do not find that these absences from duty were not caused by appellant's sickness.

[14, 15] The other violation of rules set forth in paragraph three of the notice is the refusal to let a substitute act after one had been assigned in appellant's place. That portion of the rule in question which is before us does not touch on the refusal to let a substitute teacher act for a regular teacher. Therefore, this portion of the charges and the finding based upon it may be disregarded. Further, two absences without leave may not be said to be a *persistent* course of conduct.

[16] The other faults specified in the notice of intention to dismiss relate to very serious delinquencies on the part of the teacher. They indicate a quick temper and an uncontrolled tongue. While such faults are not to be excused, often they can be corrected. Many persons have learned to curb their tempers and to control their tongues when confronted with the necessity of so doing.

It is our conclusion that some of the faults charged to appellant are not sufficiently stated in the notice to dismiss; that all of them might be corrected and overcome and that therefore they come within the protective provisions of section 5.652 of the School Code under which the notice of intention to dismiss cannot be given until the lapse of ninety days after the notice to give "the employee an opportunity to correct his faults and overcome his incompetency". Sec. 5.652, School Code. No such notice was given appellant.

The findings of fact extend the allegations of paragraphs one and two of the written charges to indicate persistence in the faults there specified.

[17] This appeal is on the judgment roll and the evidence introduced is not before us. Under such circumstances we are required to assume, in support of the regularity of the judgment, that the findings are supported by sufficient evidence. Also we may be required to assume that the evidence of persistency in the faults specified in paragraphs one and two of the charges was admitted without objection. Under these circumstances it may be that the defects in paragraphs one and two of the charges, in stating the faults, have been cured and in themselves do not furnish sufficient grounds for a reversal of the judgment.

[18] If our conclusions are correct, that section 5.652 of the School Code requires the giving of the ninety days' notice of correctible faults before the notice to dismiss can be given, and that the faults here charged are correctible, then the failure to give such ninety days' notice is fatal to this action. No such notice was given and all the proceedings here involved were premature. If this is true, the questions of the form and the sufficiency of the charges, the

sufficiency of their service on appellant, and any defects in the findings become relatively unimportant and cannot be the controlling factors in this case.

So far as we are advised, the precise questions here considered have not been decided in any reported case in California. They were neither urged nor considered in such cases as Johnson v. Taft School District, 19 Cal.App.2d 405, 65 P.2d 912; Board of Education v. Jewett, 21 Cal.App.2d 64, 68 P.2d 404, and Cottingham v. Sharpless, 28 Cal.App.2d 551, 83 P.2d 59. In the first two of these cases the charges were filed and the notices given to the teachers before the effective dates of the 1935 amendments to the School Code. Nothing in them necessarily conflicts with the conclusions reached here.

The judgment is reversed.

I concur: GRIFFIN, J.

Mr. Presiding Justice BARNARD, being disqualified, does not participate herein.

---

33 Cal.App.2d 485

## FIRST NAT. BANK OF OROVILLE v. ALDRIDGE et al.

Civ. 6175.

District Court of Appeal, Third District, California.

June 24, 1939.

Rehearing Denied July 24, 1939.

Hearing Denied Aug. 21, 1939.

**1. Appeal and error ⇨695(1)**

Where appellants attacked findings of trial court, but failed to present all the evidence on such findings, Court of Appeal would consider such findings sufficiently supported by the evidence.

**2. Courts ⇨97(5)**

In interpretation of a federal statute, the decisions of the federal courts are controlling. 12 U.S.C.A. § 29.

**3. Banks and banking ⇨261(1)**

The violation by a national bank of federal statute prescribing and limiting power of national bank to deal in realty renders transactions voidable and not void since the defense of ultra vires is not open to persons who enter into realty transactions with national banks, but United States alone can call the act in question on such ground. 12 U.S.C.A. § 29.

**4. Banks and banking ⇨261(1)**

Where national bank acquired lease of realty in payment of an indebtedness owed it and sublet realty to another who subsequently assigned sublease to others, assignees of sublease could not assert that sublease by national bank was ultra vires, as in violation of federal statute prescribing and limiting power of national bank to deal in realty, since United States alone could call act of bank in question on such ground. 12 U.S.C.A. § 29.

**5. Landlord and tenant ⇨63(1)**

A tenant cannot deny his landlord's title.

**6. Landlord and tenant ⇨64**

The assignees of a sublease, having gained possession of the premises as successors in interest of sublessee, could not deny validity of sublease.

**7. Landlord and tenant ⇨204, 224**

Where national bank acquired lease of realty in payment of an indebtedness owed it and sublet realty at specified rental to another who subsequently assigned sublease to others, and assignees agreed to pay future rentals to original lessor or "other party entitled thereto," bank was "other party entitled" to rentals and could sue assignees thereon. Civ.Code, § 1559.

**8. Landlord and tenant ⇨182, 208(2)**

A covenant in a lease to pay rent is a "covenant running with the land," and the naked assignment of the lease alone creates a privity of estate between lessor and assignee which places upon assignee the obligation to pay the rent provided for while assignee remains in possession of the premises.

[Ed. Note.—For other definitions of "Covenant Running with the Land," see Words & Phrases.]

**9. Appeal and error ⇨1122(2)**

In action by sublessor to recover tract of land from assignees of sublessee and for rentals due, a finding that assignees took possession on October 1, 1937, though erroneous, because contrary to evidence, did not require reversal of judgment in favor of sublessor, but Court of Appeal, under authority vested in it by statute and Constitution, would strike out erroneous finding and insert in lieu thereof a correct finding and modify amount of judgment for rents due accordingly. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

**10. Landlord and tenant ⇨208(2)**

An assignee is not personally liable for rents which accrue prior to his acquisition of the leasehold in absence of an agreement therefor, but he is personally liable for rents which accrue while he is in possession, even though the month or other period began before he took possession.

**11. Landlord and tenant ⇨208(2)**

Where sublease provided for first payment of rent on February 15, 1937, "and on the 15th day of each and every month thereafter," assignees of sublease who took possession on December 23, 1937, were liable for rents only that accrued after December 15, 1937.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the First National Bank of Oroville against Chester Aldridge and John Gray to recover possession of a tract of land and for rentals due, wherein the defendants filed a cross-complaint. From a judgment for the plaintiff, the defendants appeal.

Judgment modified and, as so modified, affirmed.

Chester Aldridge and John Gray, in pro. per.

Carleton Gray, of Oroville, for respondent.

PAULSEN, Justice pro tem., delivered the opinion of the Court.

By this action respondent, a national bank, recovered judgment for the possession of a tract of land in Butte county, together with $450 for rentals due. Defendants have appealed on the judgment roll and a bill of exceptions.

[1] Appellants attack many of the findings but except in a single instance, which will be noted later, they have failed to present all the evidence on these points and, upon familiar principles, we must consider such findings sufficiently supported.

The essential facts, as shown by the findings, are these: During the year 1934, one E. E. Meyers became indebted to respondent bank. On January 20, 1935, Alice O'Neal, the owner of the property involved, leased the same to Meyers for the term of 25 years, for the purpose of enabling him to process and sell sand and gravel therefrom. For convenience this will be referred to as the Meyers lease. On February 5, 1935, Meyers, who had been unable to settle his affairs with the bank, assigned this lease to it as partial security for his indebtedness. The assignment was attached to a copy of the lease, and both were recorded in the office of the county recorder of Butte county. During the year 1936, while Meyers was still indebted to the bank for the money loaned to him in 1934, he and his wife delivered to the bank a quitclaim deed to the property covered by the lease in partial satisfaction of the indebtedness. This deed was recorded May 19, 1936. On January 20, 1937, respondent sublet the property of R. S. Brandonier for the term of five years. This lease, which will be referred to herein as the Brandonier lease, provided for rental payments based upon the yardage of materials sold, but required, after July 1, 1937, a minimum monthly rental of $75. Time was of the essence of the lease. A copy of the Meyers lease was attached to this instrument. Brandonier entered into possession and paid the rent until October 1, 1937. By an instrument dated December 23, 1937, he assigned to appellants all his interest and rights under his lease from respondent. This assignment was signed and accepted by appellants and contained the following provisions: "Second parties (appellants) further agree to assume future obligation of the original lessee and first party herein (Brandonier) in payment of future rentals to the lessor, Alice O'Neal, or other party entitled thereto."

During the latter part of December, 1937, or the first part of January, 1938, appellants, who had entered into possession under their assignment of the Brandonier lease, called at the home of Alice O'Neal and, after informing her that the Meyers lease was void, induced her to make a new lease of the premises to them. She later sought to rescind this action but appellants have at all times maintained that it is in full force and effect; that they hold the property under it and not by virtue of their assignment from Brandonier.

The court further found that respondent had at all times fully complied with its obligations under the Meyers lease, and that said lease was in full force and effect; that it had taken all the steps required of it before commencing this action.

[2-4] All but two of appellants' contentions are predicated directly or indirectly upon the proposition that because respondent is a national bank, its acts in connection with the real property herein involved were ultra vires and therefore void. In view of the conclusions we have reached it is unnecessary to discuss many of appellants' arguments in detail or to decide whether or not respondent's acts, or any of them, were, in fact, ultra vires.

Numerous decisions have been called to our attention which hold that the ultra vires acts of a corporation are void and that where the corporation relies upon such acts the defense of ultra vires is available to any person sued thereon. However this principle has not been applied uniformly and contrary conclusions have been reached in many instances. Some divergence of opinion exists because of differences of state laws and even in the federal courts in cases that involved federal questions alone, the results have varied, depending upon the statute under consideration. By a process of evolution different rules appear to have developed under different statutes. See Barron v. McKinnon, 1 Cir., 196 F. 933.

The power of a national bank to deal in real estate is prescribed and limited by section 5137 of the Revised Statutes of the United States, 12 U.S.C.A. § 29, and this section is the measure of their power. California Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198. Consequently, in the interpretation of that section the decisions of the federal courts are controlling. Whatever the rules may be in state jurisdictions, or when the bank seeks to raise the defense of ultra vires, or whatever the effect of an ultra vires act may be when the case arises under some other statute, the decisions of the Supreme Court of the United States, when dealing with section 5137, supra, are uniform and consistent in holding that violations of that section by a national bank render the transactions voidable and not void; that the defense of ultra vires is not open to persons who enter into real estate transactions with such banks, but that the United States alone can call the act in question on that ground. In Kerfoot v. Farmers' & Merchants' Bank, 218 U.S. 281, 31 S.Ct. 14, 15, 54 L.Ed. 1042, the court, after again recognizing and referring to this rule, states: "While recognizing the authority of the Government to which the corporation is amenable, it has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result." See, also, Schuyler Nat. Bank v. Gadsden, 191 U.S. 451, 24 S.Ct. 129, 48 L.Ed. 258; Thompson v. Saint Nicholas Nat. Bank, 146 U.S. 240, 13 S. Ct. 66, 36 L.Ed. 956; Logan County Nat. Bank v. Townsend, 139 U.S. 67, 11 S.Ct. 496, 35 L.Ed. 107; Reynolds v. Crawfordsville Bank, 112 U.S. 405, 5 S.Ct. 213, 28 L. Ed. 733; National Bank of Genesee v. Whitney, 103 U.S. 99, 26 L.Ed. 443; Union National Bank v. Matthews, 98 U.S. 621, 25 L. Ed. 188. In Merchants' National Bank v. Weston, 34 Cal.App. 693, 168 P. 587, the court said: "It is first argued that the act of plaintiff in executing the lease under which defendant went into possession of the premises was ultra vires; that, plaintiff being a national bank, it had no authority to execute the character of lease in question. We see no force in this argument. Assuming that the bank was not authorized to make the lease, it does not lie with the plaintiff to raise the point, as the United States alone can be heard on this question."

[5, 6] There is still another reason why appellants cannot urge the defense of ultra vires. The sole purpose of such a defense was to deny respondent's title. Appellants had both constructive and actual notice of respondent's claims. They knew that Brandonier was in possession claiming under respondent and paying rent to it. With full knowledge of these facts they accepted the assignment and thus gained possession for themselves. It is well settled that a lessee cannot deny his landlord's title. Brandonier could not have done so. Storrs v. Belmont Gold Min. & Mill Co., 24 Cal. App.2d 551, 76 P.2d 197; 15 Cal.Jur. 645, 646. Appellants, having gained possession of the premises as the successors in interest of Brandonier, are in no better position. Lapique v. Plummer, 51 Cal.App. 207, 196 P. 300.

[7, 8] It is next contended that there was no privity of contract between respondent and appellants, and consequently that there was no liability to pay the rent due under the terms of the Brandonier lease. The point is without merit. When appellants signed the assignment from

Brandonier they agreed to pay future rentals to "Alice O'Neal, or other party entitled thereto". The court found that the purported lease from Alice O'Neal to appellants was not in force; that the Meyers lease, held by respondent, was in force. Therefore, respondent was the "other party entitled" to the rentals, and as the covenant was made for its benefit, it could sue thereon. Civ.Code, sec. 1559; Lopizich v. Salter, 45 Cal.App. 446, 187 P. 1075. Even in the absence of such an agreement, appellants would have been liable for rent during the period of their occupancy. The Brandonier lease contained a covenant to pay rent. This was a covenant running with the land and the naked assignment alone created a privity of estate between respondent and appellants which placed upon them the obligation to pay the rent provided for while they remained in possession of the premises. Treff v. Gulko, 214 Cal. 591, 7 P.2d 697; Baker v. J. Maier & Zobelein Brewery, 140 Cal. 530, 74 P. 22; Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L.R.A. 151; Lesser v. Pomin, 3 Cal.App. 2d 117, 39 P.2d 451; Lopizich v. Salter, supra; Lutton v. Rau, 37 Cal.App. 429, 173 P. 1111.

[9] As a part of finding VI the court found that Brandonier remained in possession until October 1, 1937, *at which time he sublet said premises to the defendants herein and put them into possession.* Appellants contend that the italicized portion of said finding is not supported by the evidence, and with this contention we agree. In this one particular the bill of exceptions purports to present all the evidence on the point. Respondent alleges that appellants had taken possession on or about October 1, 1937. This allegation was denied by the answer but appellants admitted the execution of the assignment and the taking of possession by them on December 23, 1937. The only evidence offered by either party on this point was the testimony of appellants to the effect that they *worked for Brandonier* prior to December 23, 1937, and that of that date they took the assignment and then entered into possession for themselves. However, this does not require a reversal of the judgment. There is no conflict in the evidence on this point, and but one finding could possibly be made. Under the authority vested in this court by section 4¾ of article VI of the Constitution and by section 956a of the Code of Civil Procedure, the portion of the finding mentioned above and shown in italics is ordered stricken out, and in lieu thereof we find "that on December 23, 1937, he assigned said sublease to defendants herein, and on said day put them into possession of said premises".

[10, 11] Brandonier failed to pay the rent for the months of October, November and December of 1937, and the court included in its judgment for rentals the sum of $75 for the month of December, 1937. Appellants contend that they cannot be held liable for rent for any time prior to December 23, 1937, the time they took possession. Respondent contends that the rent for the month of December was not due until December 31, 1937, and as appellants were then in possession, they were liable therefor. The Brandonier lease provided that the first payment of rent was to be made February 15, 1937, "and on the 15th day of each and every month thereafter". It follows that rent for the period from November 15, 1937, to December 15, 1937, was due on the latter date. The next instalment of rent fell due January 15, 1938. Appellants entered into possession under their assignment December 23, 1937. By their agreement to pay rent contained in the assignment appellants agreed "to assume *future* obligation of the original lessee and first party herein (Brandonier) in payment of *future* rentals", etc. (Italics supplied.) Obviously, this cannot be construed to apply to instalments of rent that had become due prior to the assignment. Likewise, the obligation to pay rent based upon the theory of privity of estate cannot include rents that fell due on or before December 15, 1937, but does include the rent due for the month ending January 15, 1938, and which accrued after appellants entered into possession. An assignee is not personally liable for rents which accrued prior to his acquisition of the leasehold in the absence of an agreement therefor. 16 R.C.L. 852. But he is personally liable for rents which accrue while he is in possession, even though the month or other period began before he took possession. Houston v. Barnett, 90 Or. 94, 175 P. 619; 16 R.C.L. 851; 52 L.R.A.,N.S., 984; 14 L.R.A. 151. Measured by these rules, it appears that appellants were liable for the rent that accrued after December 15, 1937, but not before.

It is therefore ordered that the judgment appealed from be modified by striking therefrom the figures $450 and inserting in lieu thereof the figures $412.50, and as so modified the judgment is affirmed. Respondent to recover costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

33 Cal.App.2d 629

**SCOTT v. McPHEETERS.**

**Civ. 6171.**

District Court of Appeal, Third District, California.

July 10, 1939.

Hearing Denied Sept. 7, 1939.

See 93 P.2d 562.

**1. Death 🔑31(7)**
**Infants 🔑72(2)**

A parent is authorized by statute to maintain an action for the injury or death of a minor child caused by the wrongful act or neglect of another person. Code Civ.Proc. § 376.

**2. Limitation of actions 🔑72(2)**

The statute of limitations does not run against an action by a parent for the injury of a minor child caused by the wrongful act or neglect of another person until the child arrives at the age of majority. Code Civ. Proc. § 352, subd. 1; § 376.

**3. Statutes 🔑190**

The ordinary rules of construction of a statute are applicable only when the language of a statute is uncertain and ambiguous.

**4. Infants 🔑72(2)**

Under the statute providing that a child conceived but not yet born is to be deemed an existing person so far as may be necessary for its "interests" in the event of its subsequent birth, the term "interests" is not confined to the child's right of inheritance or to its property rights, but means any advantage or profit in any property, enterprise, or thing including the benefits or rights flowing from both real and personal property or from choses in action, including the right to compensation for personal injuries wrongfully inflicted by the willful or negligent acts of another person. Civ.Code, § 29; Probate Code, §§ 90, 91.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

**5. Property 🔑5½**

"Property" embraces practically all valuable rights including choses in action, and the right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is "property" as is any valuable interest in or to any object of value that a person may lawfully acquire or hold.

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

**6. Infants 🔑72(2)**

The statute providing that a child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth, cannot be presumed to be a continuation of the common law, since the statute and the statute authorizing a parent to maintain an action after birth of a child for injuries sustained by it through the wrongful act or neglect of another person constitute a radical change from the common-law rule that an unborn child has no existence separate from its mother and so has no right of action for injuries sustained by it prior to its birth. Civ.Code, §§ 5, 29; Code Civ. Proc. § 376.

**7. Statutes 🔑147**

A provision of the Civil Code must be construed as a continuation of the common law only when the provision and the common law are substantially the same. Civ. Code, § 5.

**8. Infants 🔑72(2)**

In the absence of statute, an action for injuries sustained by an unborn child by the wrongful conduct of another will not ordinarily lie at common law either by the subsequently born child or a parent.

**9. Infants 🔑1**

The statute providing that a child conceived but not yet born is to be deemed an existing "person" so far as may be necessary for its interests in the event of its subsequent birth is not based upon a fiction but upon an established and recognized scientific fact that an unborn viable child is a "human being" separate and distinct from its mother. Civ.Code, § 29.

[Ed. Note.—For other definitions of "Human Being" and "Person," see Words & Phrases.]

**10. Evidence ⇨14**

It is common knowledge that when a child's lungs and organs are fully developed, even in a seven months' baby, it is frequently capable of living and that it actually exists as a "human being" separate and distinct from its mother, even though it is prematurely born by artificial means or by accident.

**11. Physicians and surgeons ⇨15**

Mere mistakes in the judgment of a physician do not constitute "malpractice."

[Ed. Note.—For other definitions of "Malpractice," see Words & Phrases.]

**12. Infants ⇨72(2)**

Under the statute providing that a child conceived but not yet born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth, a child could maintain malpractice suit against physician for injuries sustained by the child before its birth by the alleged negligent use of metal clamps and forceps incident to the delivery of the child. Civ.Code, § 29.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Malpractice suit by Eleanor Catherine Scott, by and through her guardian ad litem, Kathryn V. Scott, against Earl Robey McPheeters for injuries sustained by plaintiff prior to her birth. A demurrer to the complaint was sustained without leave to amend, and from the judgment, plaintiff appeals.

Judgment reversed, with directions to overrule demurrer and to permit defendant to answer.

Lercara & Nelle, of Oakland, and Francis O. Hoover, of Modesto, for appellant.

Griffin & Boone and Thomas C. Boone, all of Modesto, Dearing & Jertberg, of Fresno, and Hartley F. Peart, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against her pursuant to an order sustaining a demurrer to the complaint without leave to amend.

The suit is for damages for alleged malpractice of a physician exercised in the negligent use of metal clamps and forceps incident to the delivery of a child, resulting in serious injuries to the brain cells and spine which caused permanent paralysis. The child is eleven years of age. The action was brought by the mother as guardian ad litem for injuries sustained by the child prior to its birth. The mother is not personally a party to the suit. A demurrer to the complaint was sustained on the ground that it fails to state facts sufficient to constitute a cause of action. Judgment was rendered against the plaintiff to the effect that she take nothing by her suit. From that judgment this appeal was perfected.

The theory upon which the trial court sustained the demurrer is that neither the common law nor California statutes authorize the maintenance of a suit by a child for injuries received by it prior to birth. The merits of the appeal rest entirely upon the construction of section 29 of the Civil Code, which provides that: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

It is strenuously insisted, in support of the judgment, that the word "interests", as that word is used in the preceding section, is limited in its application, and excludes the right to maintain an action for tort committed upon a child before its birth. We think not.

[1, 2] Section 376 of the Code of Civil Procedure authorizes a father or a mother to maintain an action for the injury or death of a minor child caused by the wrongful act or neglect of another person. The statute of limitations does not run against such an action until the child arrives at the age of majority. Sec. 352, subd. 1, Code Civ.Proc. Clearly a suit for injuries wrongfully inflicted upon an unborn child by the negligent acts of another person will lie subsequent to its birth, under the provisions of section 29 of the Civil Code, provided compensation for a tort may be considered to be within the "interests" of the child as that term is employed in the above section of the code.

[3-5] Much space is devoted in the briefs to an effort to apply the ordinary rules of construction of a statute to the meaning of section 29. Those rules are applicable only when the language of a statute is uncertain and ambiguous. There appears to be no language in that section

which is uncertain or ambiguous. It seems to be as clear and concise as the English language could make it. It says that an unborn child which has been conceived is deemed to be "an existing person" when that assumption is necessary "for its interests", in the event of its subsequent birth. There appears to be no reason for confining the word "interests" to the child's right of inheritance or to its property rights. Clearly the word is general in its application and includes both personal and property rights. It must mean more than the right of inheritance, for sections 90 and 91 of the Probate Code expressly provide for the right of a pretermitted heir to inherit property. We assume the word "interests" is used in section 29 in the general sense of anything that is profitable or beneficial to the child. In Black's Law Dictionary, third edition, 996, the term is defined as "a right to have the advantage accruing from anything". All standard dictionaries include in the definition of the word "an advantage, profit or benefit" in any property, enterprise or thing. That includes benefits or rights flowing from real or personal property or from choses in action. With respect to property, it is said in 50 Corpus Juris, page 736, section 7: "Generally, the subjects of property comprise all valuable rights or interests protected by law. * * * In the broad sense of the term, 'property' includes * * * choses in action. * * * In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold."

That definition certainly includes the right to compensation for personal injuries wrongfully inflicted by the wilful or negligent acts of another person. The Supreme Court in the case of Daubert v. Western Meat Company, 139 Cal. 480, 69 P. 297, 73 P. 244, 96 Am.St.Rep. 154, seems to concede that section 29 includes both personal and property rights. At least no attempt was made in that case to limit the application of the word "interests". Mr. Justice Beatty expressly construes the word to include the very rights which are claimed in this action. In fact, he extends its application much further than is necessary in the present case. But there is no room for technical rules of construction in this case.

[6, 7] It is urged that section 29 should be construed to be a mere continuation of the common law with respect to the rights of an unborn child. We cannot agree to that assertion. Section 5 of the Civil Code declares that: "The provisions of this code, *so far as they are substantially the same* as existing statutes or *the common law,* must be construed as continuations thereof, and not as new enactments."

At common law, the weight of authority holds that an unborn child, in contemplation of law, has no existence as a human being separate from its mother, and that it therefore has no right of action for personal injuries inflicted upon it prior to its birth, by the wrongful conduct of another. Section 29 of the Civil Code is diametrically opposed to that theory, for it declares that for certain specified purposes the unborn child shall be deemed to be *an existing person.* Since our statute considers an unborn child an existing person, section 376 of the Code of Civil Procedure authorizes its father or its mother, after the birth of the child, to maintain an action for injury sustained by it through the wrongful act or neglect of another person. Certainly that radical change from the rule of the common law may not be deemed to be a continuation thereof, for the opposing principles are in no way similar. It is only when they are "substantially the same" that section 5 of the Civil Code declares that one shall be presumed to be a continuation of the other.

[8] We have been interested and instructed by excellent briefs which have been filed by the respective parties to this action. British and Irish cases have been cited. The common law of England, the civil law of Rome, Blackstone and numerous cases from several states of this country have been industriously analyzed. Able dissenting opinions are elaborately quoted. It is apparent there has been a serious conflict over the mooted question as to whether an action lies either by a parent or by a subsequently born child for injuries sustained by the child prior to its birth, as a result of wrongful or negligent acts of another person. We have examined the cases cited, together with every other one

on that subject which we were able to find. We are satisfied the weight of authority determines that such an action for injury to an unborn child does not lie at common law. We are also convinced that the common law rule in that regard has been accepted in several of the jurisdictions of the United States where no statute to the contrary exists. No case has been cited in this country or elsewhere in which statutes similar to those in question have been involved. In truth, many of the cases are specifically based on the absence of statutes regarding that subject, and they intimate or plainly state that such a rule may be authorized by statute. In none of the cases relied upon by this respondent was a statute similar to that of California involved. The preliminary paragraph to the annotations on that subject found in 97 A.L.R. at page 1524, indicates the recognition of that limitation to the declared rule. It reads: "While there is some difference of opinion in the decisions rendered since the date of publication of the original annotation as to whether a child or its personal representative may, *in the absence of statute,* maintain an action in damages for prenatal injury, a majority of the decisions support the rule denying the existence of such a right." (Citing authorities.)

The same limitation of that rule is recognized in the case of Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567, 568, 20 A.L.R. 1503, upon which this respondent strongly relies. In that case a pregnant mother fell into an open coal chute, seriously injuring her child, which was prematurely born eleven days later. In a subsequent suit for damages for injuries to the unborn child, the New York court denied relief. Mr. Justice Cardozo dissented. The decision was based on the absence of a statute upon that subject. The court said in that regard: "May this court attach an unnatural meaning to simple words and hold *independently of statute* that a cause of action for prenatal injuries is reserved to the child until the moment of its birth and then accrues?"

In the leading Irish case of Walker v. Great Northern Ry. Co. of Ireland, 28 L. R., Ireland, 69, a mother brought suit for damages for injuries sustained by her unborn child as the result of a railway accident while the mother was riding in a passenger car. In denying relief in that case the court said: "If new rights and engagements are to be created, *that is the province of legislation and not of decision.*"

[9] The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding. That theory of a fiction is forcefully answered by the able, dissenting opinion of Mr. Justice Boggs in the case of Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 640, 48 L.R.A. 225, 75 Am.St.Rep. 176, 179, as follows: "If * * * [the unborn child] reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life. * * * If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother? * * * Should compensation for his injuries be denied on a mere theory—known to be false—that the injury was not to his person but to the person of the mother? The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother."

[10] It is common knowledge that when a child's lungs and organs are fully developed, even in a seven-months baby, it is frequently capable of living and that it actually exists as a human being separate and distinct from its mother, even though it is prematurely born by artificial means

or by accident. Who may say that such a viable child is not in fact a human being in actual existence?

In truth, in applying the common law rule, that in the absence of statute, an action for injuries to an unborn child will not ordinarily lie, a distinction has often been drawn between an unborn child whose lungs and other organs are fully developed so that it is capable of living separate and apart from its mother, and those babies which are less developed. In the case of Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916, 917, L.R.A.1917B, page 334, the mother of a child was denied relief in an action for injuries received by her and by her five-months unborn child, on the ground that the infant was not then viable and could not have then existed separate and apart from its mother. The court specifically based its opinion on that doctrine and limited its application to those facts. It is said in that regard:

> "The complaint alleges the child could not have been born viable. Since a non-viable child cannot exist separate from its mother, it must, in the law of torts, be regarded as a part of its mother, and hence, being incapable of a separate existence, it is not an independent person or being to whom separate rights can accrue. Its rights are merged in those of the mother of whom it forms a part.
>
> "We go no further than the facts of the case require, and hold that no cause of action accrues to an infant en ventere sa mere for injuries received before it could be born viable.
>
> "Very cogent reasons may be urged for a contrary rule where the infant is viable, and especially so in cases where the defendant being a doctor or midwife, has negligently injured an unborn child. As to such cases we express no opinion."

In the present case there can be no doubt the child was viable and capable of existing separate and apart from its mother at the time of the alleged injury to it. It was fully developed in every respect. The injuries were alleged to have occurred in the very process of delivering the child.

In the case of Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944, 946, 97 A.L.R. 1513, upon which the respondent relies, a judgment which was rendered in a suit by the parents of an unborn child for injuries to both the mother and the child as a result of an automobile collision, from which injuries the child died nineteen days after its birth, was reversed on the ground that Texas has no statute on the subject and under the common law rule the child could not have maintained the action if it had lived. In determining the appeal the court quoted with approval from the Walker case, supra, to the effect that a rule which would allow a child to maintain an action of personal injuries sustained before its birth would be attended with serious difficulty in proving that the injuries were inflicted through wanton or negligent acts of a tort-feasor. The court quoted in that regard:

> "Justice O'Brien * * * said: 'The pity of it is as novel as the case—that an innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burthen of infirmity and ignominy throughout the whole passage of life. * * *
>
> "'But there are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be open to extravagance of testimony, already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there. * * * But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, *that is the province of legislation and not of decision.*'"

In the present case, however, we are not confronted with the weight or sufficiency of evidence to prove the necessary facts to justify a recovery by a child who claims to have been wrongfully injured at birth. It would seem to us inhuman and an acknowledgment of inherent weakness of the law to deny a remedy to one who is condemned to contend with the struggles of life in a maimed and crippled condition due to the wanton or negligent acts of another person. The difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice. We are not impressed with the reasoning that a clear remedy for an injustice should be denied because the wrong is not readily susceptible of proof. Law is progressive and should lend its aid to secure justice rather than to block it. Katz v. Walkinshaw, 141 Cal. 116, 123, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35.

On the title page of every volume of Corpus Juris, this appropriate quotation is printed from an opinion rendered by Chief Justice Greene in 1 R.I., page 356: "The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society."

To the foregoing quotation we might presume to add that the law should endeavor to keep abreast with the marvelous developments of science and the rapidly-changing conditions of the world. Precedents are valuable so long as they do not obstruct justice or destroy progress.

[11, 12] We do not even suggest the defendant in this case is guilty of malpractice. Mere mistakes in the judgment of a physician do not constitute malpractice. It may be true that the defendant made no mistake in the delivery of the child in this case. It may be true that it is impossible to satisfactorily prove that his conduct contributed in any degree to the unfortunate condition of the child. But that should not deprive one of the right to pursue a remedy for an assumed wrong.

In the case of Daubert v. Western Meat Co., supra, section 29 of the Civil Code was construed by the late Chief Justice Beatty, for whose judgment we have great respect. To be sure, his construction of that section appears in a dissenting opinion, but it is robbed of none of its force or logic on that account, for there is no statement in the opinion of the court in conflict with that feature of the case. That is the only case in which the construction and effect of section 29 has been considered by the Supreme Court. In that case a demurrer to a complaint was sustained without leave to amend. The judgment which was accordingly rendered was affirmed on appeal. The complaint alleged that Otto Daubert was killed through the negligence of the Western Meat Company. His wife previously brought suit for damages for his death under section 377 of the Code of Civil Procedure, and recovered a judgment of $5,000. She was then the mother of an unborn child, the existence of which the defendant had no knowledge, and was therefore not guilty of failing to ask that the child be joined as a necessary party to the suit. After the birth of the child, and after the judgment which was procured by her mother had become final, the child brought a separate suit for damages for the loss of her father. The opinion of the court specifically states that it refrains from deciding whether the child could maintain such an action if "the existence of an unborn child *was known to the defendant,* at the time of the previous action and trial". [139 Cal. 480, 73 P. 245, 96 Am.St.Rep. 154.] In a concurring opinion by Mr. Justice Henshaw, it is made very clear that the judgment was affirmed on the ground that since such an action *for the wrongful death of a person,* under section 377 of the Code of Civil Procedure must be brought by *"his heirs* or personal representatives", in the absence of knowledge of the existence of an unborn heir, a suit for damages by one or more heirs must be deemed to include "all of the heirs", and under such circumstances a defendant may not be harassed, and mulcted a second time for damages, for failure on the part of the plaintiff to include all the heirs. He says in that regard: "Our law contemplates that an action for a recovery in a case such as this may be brought either by the personal representative or by *all the heirs.* In the nature of things, where a pleading expresses the fact that the action is so brought by and on behalf of all the heirs, it is not expected that the defendant can or will controvert such an allegation, except upon the rare chance that he may happen to know of some one heir unmentioned and omitted. Otherwise he is entitled to rest without denial upon the allegation of the complaint, *secure in his right to be subjected to the harassment of but one action, and, should recovery be had against him, to go free from further vexation and from being mulcted a second time by payment of the amount of this judgment."*

It thus appears that the Daubert case was decided solely on the ground that a defendant could not be twice harassed by suits for the same alleged tort under section 377 of the Code of Civil Procedure, when the original complaint under which judgment was recovered, alleges that it was brought by and on behalf of "all heirs", since the defendant had no knowledge there was in existence an unborn child. There is no intimation in that case in conflict with what Mr. Justice Beatty has so clearly and forcefully stated with respect to the application of section 29 of the Civil Code under circumstances such as exist in the present action. The clear inference is that the mother might have joined the child as a plaintiff in the original suit, after its birth, and that it might have then recovered judgment for its damages.

He construed section 29 to confer upon an unborn child, in the event of his subsequent birth, the right to maintain an action for personal injury sustained through a tort when that privilege was not barred or waived. His construction of that section, under such circumstances, is not challenged by the other members of the court. His reasoning is logical and persuasive. He emphatically asserts the language of the section is too clear for controversy. He says in part:

> "Neither the first nor the final opinion quotes the language of section 29 of the Civil Code, or makes any attempt to show how it can be construed *to mean the exact opposite to what it plainly says* [quoting the section].
>
> "*Why does not this plain declaration of the statute place a posthumous child upon the same footing with a living child* with respect to an action under section 377 of the Code of Civil Procedure? If it would ever be necessary for the *interests* of a living child to prosecute a separate action after a recovery by its mother, how can it be less the interest of a posthumous child to prosecute the action? Is it again denied that a posthumous child is heir to its father? Has it less *interest in the amount recoverable* as compensation for the loss of family support? Is it better able than a living child to intervene in the first action? Is there some ground of estoppel against it that could not be urged against the suit of the living child? Is he participant of his mother's fraud in concealing his existence?
>
> * * *
>
> "If the defendant failed to make the objection in either mode that there was a nonjoinder of necessary parties plaintiff, *and suffered a recovery by a part of those entitled to sue,* he could not resist a recovery in a subsequent action by the other heirs of their share of the damages, unless he could show that the plaintiffs in the second action were estopped by some fraud or laches on their part."

The reasoning of the eminent chief justice is unanswerable. The judgment in that case was affirmed on the theory that since the complaint specifically alleged that the cause was brought in behalf of "all the heirs", and that defendant had no knowledge of the existence of an unborn heir he could not be again harassed by another suit or mulcted in further damages for the fraud or neglect of the plaintiff in the original action. The fact that this reasoning occurs in a dissenting opinion, which does not controvert the decision of the court in any respect, does not detract from its logical force or value.

The judgment is reversed and the court is directed to overrule the demurrer and permit the defendant to answer.

We concur: PULLEN, P. J.; TUTTLE, J.

33 Cal.App.2d 622

## FELTON CHEMICAL CO., Inc., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12222.

District Court of Appeal, Second District, Division 1, California.

July 10, 1939.

**1. Principal and agent** 🔑29½

A contract appointing exclusive representative for manufacturer in territory west of Denver and providing that representative should not compete with manufacturer in any similar line of products was not terminated as to manufacturer by representative's breach so as to preclude manufacturer, after obtaining judgment enjoining representative from engaging in unfair competition with manufacturer in California, from seeking under the contract to enjoin unfair competition by representative elsewhere.

**2. Judgment** 🔑326

A judgment enjoining representative of manufacturer from engaging in unfair competition with manufacturer in California in violation of contract could not be altered by order nunc pro tunc by insertion of recital that breach of contract by representative was without just cause, that contract was thereby terminated, and that representative was authorized to deal anywhere but in California.

**3. Judgment** ⚷326

The amendment of a judgment by order nunc pro tunc may not make the judgment express anything not embraced in the court's decision, though proposed amendment contains matters which ought to have been so pronounced.

**4. Judgment** ⚷313

Amendments to judgments can only be made for purpose of making the record conform to the truth, and not for purpose of revising and changing the judgment.

**5. Judgment** ⚷326

The trial court's recital in order nunc pro tunc that error in judgment which order seeks to correct was a clerical misprision will not authorize entry of order if order enlarges judgment as originally rendered.

**6. Judgment** ⚷326

The fact that trial judge informed counsel of intention to enter order nunc pro tunc amending judgment, and thereafter read contents of order to counsel without objection thereto from counsel, would not justify entry of order enlarging judgment as originally entered.

**7. Judgment** ⚷326

The fact that the court may have committed a judicial error through inadvertence and oversight will not authorize the court to summarily correct such error by an order nunc pro tunc which enlarges the judgment as originally rendered.

**8. Judgment** ⚷326

A nunc pro tunc order which enlarges original judgment in such manner as to vary rights of parties as fixed by original decision is void.

◆

Proceeding by the Felton Chemical Company, Inc., petitioner, against the Superior Court of the State of California in and for the County of Los Angeles, and another, to review and annul certain proceedings of the court.

Petition granted.

Leonard Wilson and Clifford Thoms, both of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, and Douglas De Coster, Asst. County Counsel, both of Los Angeles, for respondent Superior Court.

WHITE, Justice.

Petition to review and annul certain proceedings of the Superior Court of Los Angeles County. The facts are these:

Petitioner herein, plaintiff in an action for an injunction filed and tried in respondent court, is a New York corporation engaged in the manufacture, compounding and selling of aromatic chemicals, flavoring materials and kindred products, doing business, according to the allegations of its complaint, throughout the entire world. Prior to 1933 Albert Albek, one of the defendants in the aforesaid action, was associated with petitioner as an officer, stockholder and sales manager in its New York office. Following negotiations in 1933, a contract was executed between petitioner and said Albert Albek, which contract formed the basis of the action in the respondent court. This contract, in substance, as disclosed by the record before us, provided that Albert Albek should act as the exclusive representative of petitioner in the territory west of Denver for a certain definite period of time, and further provided that during such time Albek should not compete with petitioner in any similar line of products. Thereafter, and during the life of such contract, Albert Albek repudiated the same and, according to petitioner's complaint filed in respondent court, commenced to undermine the former's business by solicitation of petitioner's customers. Petitioner's complaint in the respondent court alleged a breach of the contract and prayed for an injunction restraining Albek and various other defendants from solicitation of petitioner's customers.

Following a trial of the action respondent court ruled that the contract had been breached by the defendant Albek, that the breach was without justification, and thereupon granted to petitioner a permanent injunction restraining Albek and the other defendants from soliciting petitioner's customers in the territory west of Denver until June 19, 1940. When the formal judgment was signed and entered by respondent court it limited the injunction to those customers of petitioner located within the territorial limits of the state of California, for the reason evidently, as indicated by the affidavit of the trial judge of respondent court contained in the return herein, that the latter was without jurisdiction to issue an injunction that would apply to customers outside the state of

California. Several months thereafter petitioner herein commenced an action in the superior court of the state of Illinois in and for the county of Cook, against Albert Albek and others, alleging that the defendants were violating the terms of their contract in the state of Illinois and otherwise unfairly and unlawfully competing with petitioner. In the affidavit filed by the judge of respondent court we find the following:

"Affiant further states that on or about the 20th day of December, 1938, he was advised by Lyle W. Rucker, attorney of record for defendants herein, that the plaintiff herein had commenced an action in the State of Illinois against the defendants Albert Albek, and Albert Albek, Inc., a corporation, wherein an injunction was sought against said defendants, based upon the identical contract, which was the subject of plaintiff's action herein, wherein plaintiff sought relief against defendants, seeking to prevent defendants from selling its products in the State of Illinois. That thereupon counsel for defendants herein and counsel for plaintiff herein called upon affiant respecting said suit so instituted in the State of Illinois, whereupon affiant informed both of said counsel that under his decision rendered in the within matter, defendants were entitled to sell, solicit customers and otherwise deal with any person or firm anywhere, provided such customers or firms did not reside in the State of California, and provided further that such persons or firms had not theretofore purchased plaintiff's products by and through the defendants. Affiant thereupon stated to said counsel that he would sign any affidavit requested by counsel for defendants which would correctly and affirmatively set forth the decision of the court as intended by affiant. The court further stated at said time that, at the conclusion of the trial, and after a full consideration of the contract set forth in plaintiff's complaint and the evidence as introduced, it was his decision that the defendants could sell anywhere and to any person or firm, other than as specifically set forth in the judgment, against which customers the defendants were specifically enjoined from selling or dealing with."

At the conclusion of the trial in respondent court, and following the announcement from the bench by the trial judge of his decision, but before the entry of any formal judgment, the parties to the litigation stipulated to the waiver of findings of fact and conclusions of law, and further agreed to forego filing any motion for new trial, and waived all rights of appeal.

[1] The record before us, therefore, presents a situation wherein the trial judge, on September 12, 1938, caused to be signed and entered a judgment in favor of petitioner herein and against the defendants in the superior court action whereby the defendants were restrained from engaging in unfair competition with the plaintiff in connection with the latter's business, and which judgment specifically enjoined defendants from soliciting customers of plaintiff within the state of California; and then some three months after the entry of such judgment, the court undertook by a purported nunc pro tunc order to change and alter such judgment by inserting therein that the contract between the parties to the litigation "was without just cause breached by Albert Albek and the Albert Albek Incorporated, and the said contract and all rights and obligations thereunder are hereby terminated", and that "it is further ordered, adjudged and decreed that the defendants Albert Albek and Albert Albek Incorporated shall have and do hereby have the right to manufacture or compound any line of products, and to advertise, sell or distribute the same, to any person, firm or concern or in any manner deal with the same, anywhere in the world, except as hereinabove specifically enjoined therefrom". (The exception being only as to customers doing business in the state of California.)

It is at once apparent that the effect of the nunc pro tunc order amending the judgment was to determine that petitioner herein, as plaintiff in the superior court litigation, was without legal or equitable means to secure redress for any unlawful breach of his contract occurring in any jurisdiction outside the state of California; and in effect it was a determination that because the contract was breached by defendants it was thereby terminated and of no force or effect in any state other than California. The so-called nunc pro tunc order created the anomalous situation of a judgment restraining defendants from unfair competition within this state, but permitting such practices, violative as they might be of the contract, outside the state of California. Surely the law never contemplated that the unlawful repudiation of a contract by one party deprives the innocent party of all of his rights under such contract. As was said in Central Oil Co. v.

Southern Refining Co., 154 Cal. 165, 166, 97 P. 177:

"Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect,' that this provision means that the violation terminated the contract, and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that, by a violation of the terms of the contract, the rights of the party violating it cease, and, as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' 9 Cyc. of L. & P., p. 618. Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. Civ.Code, §§ 1511, 1512, 1514. Such has uniformly been the construction put upon language such as this when found in contracts. Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am.Rep. 310; Mancius v. Sergeant, 5 Cow., N.Y., 271, note; Dana v. St. Paul Investment Co., 42 Minn. [194], 196, 44 N.W. 55; Westervelt v. Huiskamp, 101 Iowa [196], 202, 70 N.W. 125; Raymond v. Caton, 24 Ill. 123."

Assuming that the nunc pro tunc order was proper, in that it was corrective of a clerical error and not an addition to or change in the judgment, it was nevertheless void and in excess of the court's jurisdiction in so far as it attempted to foreclose petitioner herein from exercising his rights under the breached contract in the courts of states outside California.

[2-4] But the nunc pro tunc order of January 4, 1939, is equally without legal force because it does not by its terms amend the already entered judgment to make the latter conform to the decision which the court actually rendered, but attempts to amend by new modifications and enlargements the judgment which the court originally rendered. This the court is not empowered to do. It may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced. Freeman on Judgments, sec. 70, n. 2; First Nat. Bank of Fresno v. Dusy, 110 Cal. 69, 75, 42 P. 476; O'Brien v. O'Brien, 124 Cal. 422, 428, 57 P. 225. Indisputably, the amendment here made does change the judgment in important particulars, and amendments to judgments can only be made for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment. Black on Judgments, section 156.

[5-8] Here the trial court, after determining in the original judgment that the contract had been breached on the part of defendants, undertook by amendment to enlarge the judgment by providing that because of the breach all of plaintiff's rights under the contract had terminated so far as their enforcement outside of California was concerned. Also, in the original judgment the court determined that defendants should be restrained from soliciting plaintiff's customers within the state of California, and by the amendment sought to confer upon defendants the right to engage in the same unfair solicitation and competition outside of California. The fact that the proposed additions to the judgment were an afterthought on the part of the trial judge, as would appear from his affidavit constituting as it does part of the return herein, and from which it appears that his nunc pro tunc amendatory order of January 4, 1939, followed the receipt by him of information that petitioner herein had commenced an action in the courts of the state of Illinois based on the identical contract which was the subject of petitioner's cause of action in respondent court, does not authorize the granting of relief different from that granted when the judgment sought to be amended was rendered. The fact that the trial court might even declare in the amendatory order that the error sought to be corrected was a clerical misprision does not help matters when, as here, the situation upon its face shows that the error was nothing of the sort; nor is the situation aided by the fact that the trial judge informed petitioner's counsel of

his intention to make such an order and thereafter read the contents thereof to plaintiff's counsel without objection thereto from the latter, because this is a question of jurisdiction. Neither does the fact that the court may have committed a judicial error through inadvertence and oversight give it the right to summarily correct such error. Forrester v. Lawler, 14 Cal.App. 171, 111 P. 284. The nunc pro tunc order of January 4, 1939, is therefore void, for the additional reason that the plain effect thereof was to change and enlarge upon the original judgment in such a manner as to vary the rights of the parties as they were fixed by the original decision. Van Tiger v. Superior Court, 7 Cal.2d 377, 60 P.2d 851.

For the foregoing reasons, it is ordered that the nunc pro tunc order of respondent court made January 4, 1939, attempting to correct the original judgment, and the amendatory judgment dated January 9, 1939, and entered January 10, 1939, in the action pending in respondent court numbered 427200, are, and each of them is, annulled, and the respondent court is directed to reenter the amendatory judgment dated September 1, 1938, entered and docketed September 12, 1938, effective as of said last-named date.

I concur: DORAN, Acting P. J.

33 Cal.App.2d 649

**GARRIS et al. v. CARPENTER et al.**

**Civ. 6061.**

District Court of Appeal, Third District, California.

July 12, 1939.

Hearing Denied Sept. 6, 1939.

**1. Insurance 🔑44**

Reinsurance companies which entered into new reinsurance treaties with insurance commissioner, who was receiver and liquidator of insolvent insurance company, in accordance with court order authorizing treaties, were not "general creditors" of insurance company.

[Ed. Note.—For other definitions of "General Creditor," see Words & Phrases.]

**2. Insurance 🔑44**

The insurance commissioner, as receiver and liquidator of insolvent insurance company, had duty to administer its affairs for the benefit of the policyholders and the public generally, as well as for the general creditors.

**3. Insurance 🔑44**

Insurance commissioner, who was ex officio receiver and liquidator of insolvent insurance company, was entitled to purchase reinsurance for outstanding policies from reinsurance companies, if he could effect a substantial and ratable distribution to creditors.

**4. Insurance 🔑44**

The insurance commissioner, as liquidator of insolvent insurance company, was a "state officer," performing duties enjoined on him by the state, and in their performance he acted in behalf of the state.

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

**5. Insurance 🔑44**

The insurance commissioner is a "ministerial officer," and is called on to exercise very broad judgment and discretion in the performance of his duties.

[Ed. Note.—For other definitions of "Ministerial Office; Officer," see Words & Phrases.]

**6. Insurance 🔑44**

What insurance commissioner did as ex officio receiver and liquidator of insolvent insurance company, in entering into reinsurance contracts with reinsurance companies, was to be judged from the facts existing at the time he filed his petition requesting authorization to enter into such contracts.

**7. Fraud 🔑50**

Generally, fraud is not presumed.

**8. Insurance 🔑44**

In action by general creditors of insolvent insurance company for which insurance commissioner had been appointed ex officio receiver and liquidator, against commissioner and reinsurance companies with which the commissioner had entered into reinsurance contracts, general creditors had burden to show fraud or conspiracy by at least satisfactory evidence.

**9. Evidence ⚷472(1)**

Where questions called for a conclusion of the witness in regard to ultimate facts in the case, objections thereto were properly sustained.

**10. Appeal and error ⚷1058(2)**

Where information sought by questions was testified to fully by the witness in response to other questions, trial court's action in sustaining objections to the questions did not constitute prejudicial error.

**11. Appeal and error ⚷1056(1)**

Where answers, to which objections were sustained, could not have affected the ultimate determination of the case, trial court's action in sustaining objections did not constitute prejudicial error.

**12. Insurance ⚷44**

Insurance commissioner, who was ex officio receiver and liquidator of insolvent insurance company, was not required to give notice to general creditors of company of petition for authorization from court to enter into reinsurance contracts with reinsurance companies.

**13. Insurance ⚷44**

In action by general creditors of insolvent insurance company for which insurance commissioner had been appointed ex officio receiver and liquidator, against commissioner and reinsurance companies with which the commissioner had entered into reinsurance contracts, evidence of fraud and conspiracy in alleged unlawful preference was insufficient for jury.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Roy S. Garris and another against Samuel L. Carpenter, Jr. (substituted for E. Forrest Mitchell), Insurance Commissioner of the State of California and ex officio receiver and liquidator of the Union Automobile & Casualty Company, and others, for fraud and conspiracy in an alleged unlawful preference. From judgments in favor of the defendants, the plaintiffs appeal.

Judgments affirmed.

V. P. Lucas and Henry G. Bodkin, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and John L. Flynn and E. P. Fay, Deputy Attys. Gen., for respondents Carpenter et al.

Syril S. Tipton, of Los Angeles, for respondent Associated Fire & Marine Ins. Co.

MONCUR, Justice pro tem., delivered the opinion of the court.

This action has heretofore been before this court on appeal by plaintiffs, appellants herein, from a ruling by the trial court sustaining demurrers to their complaint without leave to amend. Garris v. Mitchell, 7 Cal.App.2d 430, 46 P.2d 225. A statement of the contentions of appellants constituting their cause of action as set forth in said decision is referred to for the purpose of this opinion.

E. Forrest Mitchell was insurance commissioner of the state of California at the time of the commencement of this action and was succeeded in that office by respondent Samuel L. Carpenter, Jr. After the remittitur came down on the former appeal, appellants, by a second amended and supplemental complaint, substituted said Samuel L. Carpenter, Jr., in the place and stead of said E. Forrest Mitchell as such insurance commissioner and as one of the defendants in this action. The second amended and supplemental complaint was filed, of course, for the purpose of making the substitution made necessary by the change of the individuals holding the said office and to allege a demand upon said Samuel L. Carpenter, Jr., as such commissioner, to take suitable action to recover the sums alleged to have been paid and of his refusal and neglect to take the demanded action, and that by reason of such failure and refusal that he be removed as receiver and some other person be appointed.

For the sake of brevity, E. Forrest Mitchell and Samuel L. Carpenter, Jr., will be referred to as the Commissioner; Union Automobile & Casualty Company will be referred to as the Union Company; International Re-Insurance Corporation will be referred to as the International Company; Associated Fire & Marine Insurance Company will be referred to as the Associated Company; and the Independence Indemnity Corporation will be referred to as the Independence Company. Mr. H. A. Benjamin was the special deputy commissioner in charge of the liquidation of the Union Company's assets throughout the proceedings and will be referred to as the liquidator.

The Commissioner and the Associated Company filed answers denying the fraudulent character of the transaction set forth in the amended complaint. The Commissioner's answer also denied the indebtedness owing by the Union Company to the Associated Company, to the International Company and to the Independence Company. The action came on regularly for trial and it was stipulated at the trial that the answer of the Associated Company would stand and be deemed as the answer for each of the other respondent companies. The appellants introduced evidence before the court and after resting their case respondents introduced no evidence. Prior to the trial of the action the International Company and the Independence Company had become insolvent and had been taken over by the Commissioner and their affairs were in process of liquidation by the Commissioner at the time of the trial of the action. When appellants' evidence was concluded the Associated Company moved for a nonsuit upon the ground that there was no evidence establishing fraud or conspiracy and that under the evidence there was no preference shown and there was no showing or inference upon which fraud could be predicated. The Commissioner on behalf of the International Company and the Independence Company moved for judgment upon practically the same grounds as the motion for nonsuit on the part of the Associated Company was made. A motion was also made on behalf of the Commissioner as receiver for the Union Company for nonsuit upon practically the same grounds as the motion for nonsuit upon the part of the Associated Company were made. The court granted the motions and pursuant to the order of the court, findings of fact and conclusions of law were made and thereupon judgment was entered against appellants and in favor of the Commissioner as liquidator of the International and Independence Companies, dismissing the said action. Also judgments following the motions for nonsuit were entered, dismissing the action as to defendant Associated Company and the Insurance Commissioner as ex-officio receiver and liquidator of the Union Company. This appeal is now before this court upon these judgments.

At the time the Commissioner took over the Union Company said company carried reinsurance treaties with the International Company, Associated Company, and Independence Company. These latter reinsurance carriers, following the appointment of the Commissioner as receiver of the said Union Company, notified the Commissioner of their intention to cancel the reinsurance treaties. Thereupon the respondent Commissioner made a survey and estimates of the assets and liabilities of the Union Company and, in the exercise of his judgment, determined on the course of reinsurance of the outstanding policies.

In the order of the court authorizing the Commissioner to take charge of the Union Company he was directed to conserve its assets for the benefit of its policyholders, its creditors, and the general public. The Commissioner filed a petition requesting authorization from the court to enter into reinsurance contracts with the Associated Independence and International companies. In this petition it is stated that from a summary examination and audit of the books of the Union Company it appeared that a considerable portion of the insurance policies issued by said Union Company were reinsured in other insurance companies; that under said reinsurance treaties the Union Company was indebted to said reinsurance companies in the sum of $147,091.18; that respondent corporation carried on its own books insurance policies covering property damage and collision on which there was a gross unearned premium of about $61,364; that should the Commissioner cancel all reinsurance treaties and return to the policyholders the unearned premiums, the resultant dividend ratio distributable to all claimants would be approximately fifty-five to one hundred of the amount of the claim; that in order to render the insurance service called for under the policies theretofore issued to a great number of policyholders throughout the state of California it was proposed that the Commissioner and the reinsurance companies enter into an agreement whereby the reinsuring companies would discount their claims for the amounts due under reinsurance treaties by ten per cent, and accept payment of said discounted balances in deferred payments of such amounts as would be within the income of said respondent company. Attached to the petition as exhibits A, B and C were copies of the agreements which the Commissioner proposed to enter into with the International Company to which the Union Company was then indebted in the sum of $98,481.74, with the Associated Company to which the Union Company was then indebted in the sum of $36,543.96, and with the Independence Company to which the Union Company was then indebted in the sum of $12,065.48; that the authorization of the Commissioner, as liquidator, to enter into the agreements and reinsuring treaties mentioned would result in the numerous policyholders throughout the state of California receiving one hundred per cent insurance service under their policies and the distribution of a dividend ratio of about 54.5 to 100 to the general claimants; and that said results would not materially affect the general claimants and would be of great benefit to the large number of policyholders throughout the state of California, and in keeping with public policy.

The court granted the petition and authorized the entering into of the proposed reinsurance treaties. The appellants herein were general creditors of the Union Company, and it is their contention that the Associated, International, and Independence companies were also general creditors and that by the making of the payments under these reinsurance treaties there was a preferment as against the appellants and the other general creditors of the Union Company, and that thereby a constructive fraud as to them resulted.

On the former appeal in this case (Garris v. E. Forrest Mitchell et al., supra), the appellate court held that the complaint in the action stated a cause of action for fraud and contained a prayer for general and other relief to which plaintiffs would be entitled should they sustain the allegations of the complaint. On the trial of the action, appellants introduced in evidence a petition seeking authorization from the court to enter into the reinsurance contracts and called as a witness Mr. H. A. Benjamin, in charge of the liquidation proceedings under section 2055 of the Code of Civil Procedure. From the testimony of the liquidator it appeared that the premiums on reinsurance contracts such as the ones here involved are payable in advance, and that the amounts stated in the petition as being due from the Union Company to the reinsurance companies are the amounts which would have been owing had the policies been continued in force according to their terms; that the Union Company had not made any payments in advance but had made payments from time to time as premiums were earned; that at the time when the Commissioner took over the Union Company for liquidation there were overpayments on account of reinsurance treaties to the Associated and International. He did not testify as to whether there were any overpayments to or any balances due the Independence Company for earned premiums, and the record is silent concerning this particular fact. It may be assumed therefore that had there been any earned premiums due to the Independence Company it would have been shown by the evidence.

In connection with the statements of indebtedness from the Union Company to the reinsurance companies, he testified that these were amounts which would have been owing only in the event that the reinsurance treaties were continued in force according to their terms and for the time specified in the treaties. He further testified that he had gone over the assets that came into the hands of the liquidator and made estimates of the values of those assets as complete as was possible in the time available and for the actual determination of the issues involved in many of the claims; that he believed from his appraisement of the assets of the Union Company that he could ultimately pay 54.5 per cent to the general creditors at the time he presented the petition to the court and that the result would not materially affect the general claimants and would be of more benefit to a large number of policyholders throughout the state of California.

[1] The old reinsurance treaties were cancelled and new insurance treaties were entered into by the Commissioner with the reinsurance companies. It is contended by respondents that by reason of the fact that the payments which were concededly made by the Commissioner under the new reinsurance treaties secured by him, such payments were not made to said reinsurance companies as general creditors of the Union Company. We are of the opinion that the reinsurance companies, under the new reinsurance treaties, were not general creditors of the Union Company, but even if it be conceded that they were such general creditors, it does not follow that as to appellants and the other general creditors, any preferment was made as to them or any detriment suffered by them of which they could complain or which, under all of the circumstances disclosed by the evidence, either actual or constructive fraud as to them resulted.

[2] It was the duty of the Commissioner as receiver and liquidator to administer

the affairs of the Union Company for the benefit of not only the general creditors but also of the policyholders and the public generally. In the case of H. D. Roosen Co. v. Pacific Radio Pub. Co., 123 Cal.App. 525, 534, 11 P.2d 873, 876, in speaking of the duties of a commissioner in a like case it is said:

"His function is that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest."

[3] Under the authority vested in him, the Commissioner made a survey of the valuation of the assets in order to determine whether he could effect a substantial and ratable distribution to creditors, and having arrived at the conclusion that this could be done and that he could also purchase reinsurance for the outstanding policies without material detriment to other parties interested, he proceeded accordingly. Under such a situation what was said by the court in the case of Daniel v. Layton, 7 Cir., 75 F.2d 135, 137, seems applicable here:

"Moreover, appellants are not concerned with the terms of the reinsuring contract. It does not affect or concern them. They should not be permitted to defeat the well-matured plans of the receiver merely because the reinsurance contract may be a highly desirable one from the policyholders' viewpoint. They are interested merely in the allowance and payment of their claims. If they receive their proportionate share of the assets they cannot be heard to complain of the highly favorable contract of reinsurance which benefits the policyholders.

"Nor do we see merit in appellants' contention that they are entitled to have the property sold and the affairs of the company liquidated, even though they frustrate the plan of reinsurance and defeat the rights of the policyholders whose claims are perhaps fifty times as great as appellants'. The case of Coriell v. Morris White, Inc. (C.C.A.) 54 F.2d 255, is authority for the course pursued here. Even in the absence of precedent we think such a plan must meet with judicial approval. The contentions of one creditor must be considered in the light of their effect on other creditors. This, we think, is particularly true in insurance company reorganizations or where the insurance of an insolvent insurance company is reinsured in another company. All that any creditor may legitimately ask is fairness in the distribution of assets. In determining fairness the court may, in cases like the instant one, accept appraisal values instead of resorting to liquidation through sales, etc."

[4] The Commissioner as liquidator of the insolvent insurance company is a state officer, performing duties enjoined upon him by the state and in their performance he acts in behalf of the state. Mitchell v. Taylor, 3 Cal.2d 217, 219, 43 P.2d 803. The laws of this state vest in the Commissioner wide powers for the purpose of enabling him to perform the duties required of him. Undoubtedly such laws were enacted for a purpose connected with the public interest, and the legislature has declared that the liquidation of insurance companies is a matter in which the state has an interest. In the absence of the completion of the liquidation proceedings and a final accounting, there is nothing in the record to show that the general creditors were injured by the action of the liquidator in effecting reinsurance or that his estimates were erroneous. In the case of Ballerino v. Mason, 83 Cal. 447, 450, 23 P. 530, quoting from the case of Kendall v. Stokes, 3 How. 87, 98, 11 L.Ed. 506, it is said: "'A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake.'"

[5, 6] Undoubtedly the Commissioner is a ministerial officer and is called upon to exercise very broad judgment and discretion in the performance of his duties. What he did in the matter is to be judged from the facts and circumstances existing at the time he filed the petition and upon which the order authorizing reinsurance treaties was issued.

[7, 8] It appears from the evidence that the liquidator, when the reinsurance companies notified the Commissioner of their determination to cancel the reinsurance treaties in force at the time the Commissioner took charge of the Union Company entered into negotiations with representatives of the Associated, International and Independence Companies for the purpose of ascertaining if new insurance treaties could be negotiated and if there was any fraud or conspiracy on the part of the reinsurance companies, it could only be

inferred from the fact that there were such negotiations. Generally, fraud is not presumed, and in this case the burden rested upon appellants to show the existence of fraud or of the conspiracy by at least satisfactory evidence. Appellants fell far short of succeeding in presenting such proof.

[9-11] It is the claim of the appellants that the trial court committed error in sustaining objections to a number of questions which were propounded to Mr. Benjamin by their counsel while he was testifying in the case and by reason of which prejudice resulted. We have carefully examined the entire record in regard to this contention. A statement of the various questions and answers to which objections were made and sustained is not considered necessary. In a number of instances the questions asked called for a conclusion of the witness in regard to ultimate facts in the case and the rulings thereon were therefore proper. As to practically all of the other alleged errors, the information sought was testified to fully by the witness in response to other questions propounded by counsel for appellants. As to any other rulings which could not be included under the foregoing class of questions, if any, if answers had been obtained to such questions they could not possibly have affected the ultimate determination of the case one way or the other. In either event, if it be conceded that the trial court erred in any of its rulings rejecting proffered evidence, prejudice did not thereby result.

[12] The complaint is also made by appellants that no notice of the hearing on the petition for entering into the new reinsurance treaties was given to appellants or any of the other general creditors. There is no statutory requirement for such notice. Therefore, it rested in the discretion of the receiver and the court as to whether notice should be given. As notice of the hearing was not required either by statute or by the court this objection is not tenable.

[13] It now remains to be determined whether there was such a conflict in the evidence as would preclude the trial court from granting the motions for nonsuit. It is the contention of appellants that the introduction in evidence of the petition wherein the various items of indebtedness are set forth, taken in connection with the testimony of Mr. Benjamin in respect to these matters of claimed indebtedness, created such a conflict that motions for nonsuit would not lie. Much of the difficulty in connection with the consideration of this claimed conflict arises in connection with the use and meaning of the words "indebted" and "indebtedness". The meaning of the words "indebted" and "indebtedness" must be determined from the general context of the petitions themselves, the use of these words in connection with insurance and reinsurance matters and treaties and the general purpose of the presenting of the petition and the obtaining of the order sought pursuant thereto. So, considering the petition and construing it in connection with the testimony of Mr. Benjamin, it cannot be said that there is any conflict whatever in the evidence. Therefore, under the evidence it appears, without substantial conflict, that there was no misstatement in the petition pursuant to which the order was made authorizing the reinsurance treaties which were entered into by the Commissioner; that the Commissioner and the liquidator believed that it was proper and for the best interests of all parties interested that the new reinsurance treaties should be effected; that the examiner and liquidator acted in entire good faith in the proceedings and properly exercised the judgment and discretion vested in them; also that no bad faith, fraud, or acts from which a conspiracy could be inferred are shown on the part of the reinsurance companies.

We are satisfied that judgment pursuant to the findings of fact and conclusions of law and the judgments following the orders granting the motions for nonsuit are correct, and they are and each of them is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

14 Cal.2d 44

## MANNING v. GAVIN et al.

S. F. 16204.

Supreme Court of California.
July 20, 1939.

**1. Appeal and error 🔑801(3)**

Where trial court vacated its order extending time for appellant to file proposed bill of exceptions, entered after 10-day period for filing of proposed bill prescribed by statute, such order was not subject to review by Supreme Court upon respondent's motion to dismiss appeal. Code Civ.Proc. §§ 650, 1054.

**2. Appeal and error 🔑900**

Upon appeal, the intendments are in favor of the trial court's order.

**3. Exceptions, bill of 🔑43(1)**

The time limit for filing of proposed bills of exceptions prescribed by statute is "directory" only, and not "mandatory," and trial court has power, pursuant to statute, upon a showing of excusable neglect or mistake, to relieve a party from his default in failing to file a transcript or proposed bill within time. Code Civ.Proc. §§ 473, 650.

[Ed. Note.—For other definitions of "Directory (Adjective)" and "Mandatory," see Words & Phrases.]

**4. Exceptions, bill of 🔑43(2)**

The trial court did not abuse its discretion in relieving appellant from default in failing to file proposed bill of exceptions within time prescribed by statute, where delay of appellant's attorney in filing proposed bill was due to inadvertence of his clerk in entering an erroneous date of service of notice of order denying motion for new trial. Code Civ.Proc. §§ 473, 650.

**5. Appeal and error 🔑801(1)**

The policy of the law generally favors the hearing of appeals on the merits.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by H. E. Manning against Constance May Gavin and others for attorney's fees. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

For prior opinion, see Cal.App., 84 P.2d 1067.

Philip R. McEnerney, of San Francisco, for appellant.

Leslie L. Heap, of Los Angeles, and J. Thaddeus Cline, of San Francisco, for respondent.

SHENK, Justice.

This is a motion to dismiss an appeal from a judgment for the defendants in an action to recover attorney fees.

The record shows that a notice of the order denying the plaintiff's motion for a new trial was served on the plaintiff's attorneys, Samuel J. Jones and Philip McEnerney, on August 20, 1937; that the clerk in the office of attorney McEnerney inadvertently entered the date of service as August 30, 1937. Notice of appeal was filed on August 30, 1937. On September 7, 1937, Mr. McEnerney applied to the trial court for an order extending time within which to file a proposed bill of exceptions. The court made its order granting an extension to October 5, 1937. It is to be noted that the order was applied for and granted after the expiration of the ten-day period prescribed by section 650 of the Code of Civil Procedure for the filing of a proposed draft of the bill. Thereafter, on September 20, 1937, the defendant and respondent, Constance May Gavin, moved to set aside the order granting additional time as beyond the jurisdiction of the court; also to terminate the proceedings on appeal. On September 27, 1937, the trial court properly granted the motion to set aside the order extending time. Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687; section 1054, Code Civ.Proc. On October 2, 1937, the trial court denied the motion to terminate the proceedings for preparation of the record on appeal. At the same time it granted the plaintiff's motion theretofore made for relief from his default in failing to file a proposed bill of exceptions within the time prescribed by said section 650. The plaintiff filed his proposed bill of exceptions on October 5th following, and subsequently the bill of exceptions was settled and filed.

The present motion to dismiss the appeal from the judgment is made on the grounds that on September 7, 1937, the court had no jurisdiction to extend the plaintiff's time within which to file a proposed bill of exceptions; and that the court abused its discretion in relieving the plaintiff from his default.

[1] There is no necessity to discuss the first ground, inasmuch as the trial court vacated its order extending time and there is no such order subsisting and subject to review in this proceeding. The question is whether the trial court abused its discretion in relieving the plaintiff from his default.

[2-4] The intendments are in favor of the trial court's order. The court must have believed that attorney McEnerney had charge of conducting the preparation of the record on appeal and that the delay in filing a proposed bill of exceptions was due to inadvertence of his clerk in entering an erroneous date of service of notice of the order denying the motion for a new trial. The time limit prescribed by said section 650 is not mandatory, but is directory only. McWilliams v. Hudson, 98 Cal.App. 185, 187, 276 P. 598, 277 P. 529. The trial court has power, pursuant to section 473 of the Code of Civil Procedure, upon a showing of excusable neglect or mistake, to relieve a party from his default in failing to file a transcript or proposed bill within time. Banta v. Siller, 121 Cal. 414, 53 P. 935; Haviland v. Southern California Edison Co., 172 Cal. 601, 158 P. 328; Landreth v. Ducommun, 8 Cal.2d 694, 68 P.2d 231. It has been held that the inadvertent entry of an erroneous date in the journal of proceedings kept by the defaulting party's attorney would justify an order relieving the party from the default resulting therefrom. Haviland v. Southern California Edison Co., supra. We perceive no good reason to disturb the order of the trial court relieving the plaintiff from his default. It does not appear that the court abused its discretion in granting such relief.

[5] The policy of the law generally favors the hearing of appeals on the merits. Lewith v. Rehmke, supra; Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; Haviland v. Southern California Edison Co., supra; Banta v. Siller, supra. In Banta v. Siller, supra, 121 Cal. at page 416, 53 P. at page 935, it was said: "Indeed, it has been frequently said here that in cases of doubt the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation might be presented," citing cases.

The motion to dismiss the appeal is denied.

We concur: EDMONDS, J.; HOUSER, J.; CURTIS, J.

---

14 Cal.2d 59

## BAKER v. GIBSON et al.

Sac. 5084.

Supreme Court of California.

July 21, 1939.

Rehearing Denied Aug. 18, 1939.

**1. Mines and minerals 🔑70(6)**

Where mining lease was for a term to begin seven days after lessor's shovel was delivered at mining claim, and the shovel was delivered in defective condition and unfit to perform intended services, in lessor's action to recover rent due, evidence sustained finding that lessees necessarily incurred expense of $266.88 in repairing shovel. Civ.Code, § 1957.

**2. Mines and minerals 🔑63**

A mining lease, providing that term thereof was to begin seven days after lessor's shovel was delivered at mining claim, was to be construed in light of statutes regarding lessor's duty to put personalty into condition fit for the purpose for which he lets it. Civ.Code, §§ 1955–1957.

**3. Bailment 🔑9**

Where mining lease was for a term to begin seven days after lessor's shovel was delivered at mining claim, shovel was delivered in defective condition, and lessor left state the day before delivery without leaving his address so that lessees could not notify him of cost of necessary repairs, lessees were entitled to credit against liability for rent for reasonable sum necessarily expended in repairing shovel. Civ.Code, §§ 1955–1957.

**4. Bailment 🔑9**

Where mining lease was to begin seven days after shovel was delivered at mining claim, shovel was delivered in a defective condition, and lessor left state day before delivery without leaving his address, lessees were authorized to expend reasonable sum in repairing machine, although they were unable to notify lessor of cost of the necessary repairs. Civ.Code, §§ 1955–1957.

**5. Mines and minerals ⚷63**

Where lease provided that it was made for purpose of making operating test of certain property for period of 30 "operating days," and defining operating day, lease was properly construed to be for a period of 30 operating days as distinguished from calendar days.

**6. Mines and minerals ⚷70(2)**

Where mining lease provided that second rent installment should be paid when operating tests should begin, which should be not later than seven days after lessor's shovel was returned to mining claim, the second installment was not due until seven days after shovel had been delivered to lessees and was put in proper condition to be used for purpose for which it was rented. Civ. Code, §§ 1955–1957.

**7. Mines and minerals ⚷70(1)**

Where mining lease provided that second $200 installment of rent should be paid when operating tests began which should be not later than seven days after lessor's shovel was returned to mining claim, and where, prior to time second installment became due, lessees had expended for lessor's benefit, in repairing his shovel, the sum of $266.88, the lessees were not in default, but lessor, improperly terminating lease for failure to pay second installment, was entitled to credit for amount of second installment against lessees' counterclaim for repairs.

**8. Mines and minerals ⚷70(1)**

Where mining lease provided that final installment of rent should be paid within 10 days after operating tests began, but excused lessees from performance of any term or payment when performance was prevented by act of God or the elements and on March 1, 1935, after six days had elapsed following commencement of operating tests, heavy rain broke ditch cutting off water supply and postponing operations, operations were not resumed until March 11th, and lessor wrongfully terminated lease on March 13th for alleged default in payment of prior installments, lessees were not liable for final installment of rent.

---

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Suit by M. D. Baker against N. M. Gibson and others, to terminate a lease and to recover possession of a placer mining claim and equipment, wherein the defendant filed a counterclaim. From an adverse judgment, plaintiff appeals.

Judgment modified, and as modified, affirmed.

Carter & Barrett and Carter, Barrett, Finley & Carlton, all of Redding (Oliver J. Carter, of Redding, of counsel), for appellant.

Chenoweth & Leininger, of Redding, for respondents.

THOMPSON, Justice pro tem.

The plaintiff brought suit to terminate a lease and to recover possession of a placer mining claim and equipment in Shasta county. The first count sought to recover the right of possession of the property. The second cause of action was for two instalments of rent alleged to be due, amounting to $850. The answer conceded the termination of the lease and disclaimed the desire to retain possession of the property by the defendants. It denied that instalments of rent were due or owing to plaintiff. In a counterclaim the defendants asked for judgment for $266.88 necessarily expended by the defendants in repairing the machinery to render it suitable for the purpose for which it was leased.

The court adopted findings favorable to the defendants, determining the plaintiff wrongfully and unlawfully terminated the lease March 13, 1935, and that no instalments of rent were then due or owing to him. But title to the leased property was quieted in plaintiff by consent expressed in the pleadings. Judgment was rendered accordingly. From that judgment the plaintiff has appealed.

The cause involves chiefly a construction of the terms of the written lease which was executed January 2, 1935, material portions of which read as follows:

"This lease is made for the purpose of making an operating test on the Ringius and Heynen property hereinabove mentioned and described, for a period of thirty (30) operating days for the sum of Thirty-five ($35.00) Dollars per day as rent, and it is hereby agreed that an operating day shall consist of a minimum of four (4) hours working with the shovel, and a maximum of one (1) day shall be considered twenty-four (24) hours working with the shovel aforesaid.

"And it is hereby further agreed that the commencement of the said thirty (30) days shall not be later than seven (7) days after the shovel above mentioned is returned to the property by the said lessor herein. The said shovel now being off the property for the purpose of widening a ditch of the Happy Valley Water Company.

"The said lessees hereby agree to pay the said sum of Thirty-five ($35.00) Dollars per day as rent in three installments as follows:

"The sum of Two Hundred ($200.00) Dollars shall be paid upon the execution and delivery of this assignment of lease and option; the sum of Two Hundred ($200.00) Dollars shall be paid when the operating test begins which shall not be later that seven (7) days after the shovel is returned to the above mentioned property, as hereinabove mentioned, the remaining Six Hundred Fifty ($650.00) Dollars shall be paid within ten (10) days after the operating test begins.

* * *

"It is hereby further agreed by and between said lessor and said lessees that all improvements, repairs, together with work, labor, supplies, water rents, royalties and all other operating expenses during the term of this test shall be at the expense of the said lessees.

* * *

"The said lessees are hereby excused from the performance of any term, condition, covenant, or payment, when the performance of the same is prevented by the acts of God, strikes, war, insurrections, or the elements beyond the control of man.

* * *

"In the event the said lessees * * * shall at any time be in default in making any of the payments herein specified to be made, then this assignment of lease and option shall terminate, * * * provided that before such forfeiture * * * the said lessor shall notify the said lessees, or their assigns, in writing, that they are in default *and specify in what particulars.*"

The object of the lease was to enable the defendants to prospect for mineral. The most important part of the equipment was a power shovel, without which the dredging project could not be performed. The lease was executed "for a period of thirty (30) *operating days*", to begin seven days after the shovel was delivered at the claim. It was then being used on other property. The lease did not contemplate a continuous use of the machinery. It specifically provides that the lessee is relieved of its terms by conditions "beyond the control of man". The consideration for the lease was $35 for each operating day. The lease provides that "an operating day shall consist of a minimum of four (4) hours working *with the shovel,* and a maximum of one (1) day shall be considered twenty-four (24) hours *working with the shovel*". Payments of the total sum of $1,050 became due in three instalments as follows: $200 upon the execution of the lease, which was paid; $200 "when the operating test begins", and the remaining $650 "within ten days after the operating test begins."

[1] The shovel was not delivered until February 17th. It was then out of repair and unfit for use, as the plaintiff well knew. The center gudgeon sleeve, shaft and bushings were broken. Although the plaintiff's attention was called to that fact, he failed to repair the machine and left for Oregon before it was delivered. The defendants did not know where to address him during his absence. They were therefore unable to notify him of the cost of such necessary repairs as provided by section 1957 of the Civil Code. They, however, promptly ordered the required parts to be shipped to them at a cost of $216.88, and had them installed at a further reasonable charge of $50. The court found that the defendants necessarily incurred an expense of $266.88 in repairing the shovel so as to enable them to use it for dredging purposes. That finding is supported by the evidence.

The evidence is uncontradicted that the first day the defendants were able to use the machine was February 25th. They then had further trouble with the machinery which required tuning, adjusting and aligning. They were unable to continue operations until March 3d. On that day the pinion of the chain-drive to the screen broke and they were compelled to remove it and take it to town for repairs. Before they could resume operations a heavy storm occurred and the Happy Valley ditch, upon which they relied for water to wash tailings, broke, entirely shutting off their supply and preventing them from operating again until March 11th. They then continued dredging for four days, when they were notified by the plaintiff that their lease was terminated for failure to pay the second instalment of rent. The machinery was actually operated only five days during the time they were permitted to use it. There is no evidence they secured any returns from their enterprise.

February 26th, the day after the first ineffectual effort to operate the shovel, the plaintiff visited the property and demanded payment of the second instalment of $200. He was then told of the necessary expense of $266.88 incurred by the defendants to place the shovel in workable condition. The receipted bill of $216.88 was then offered to him in full settlement of the second instalment, which was refused. March 13th, the plaintiff served the defendants with written notice of default of the payment of the second instalment only, and of his intention to terminate the lease on that account. No further work was performed on the premises after March 14th. The defendants abandoned the enterprise on account of the notice terminating the lease. This suit was then commenced.

The court found that the shovel was delivered to the defendants in a defective condition and unfit to perform the services for which it was intended, as the plaintiff knew; that the plaintiff was out of the state of California and the defendants were unable to notify him of the cost of repairing the shovel, but that they expended in necessarily repairing the machine to place it in workable condition, the sum of $266.88, which the plaintiff refused to pay; that the first day upon which the defendants were able to operate the machine was February 25th; that on account of defective and broken machinery and the bursting, due to unusual storms, of the Happy Valley ditch, upon which source they relied for water to operate their washing machine, they were unable to resume operations, with the exception of an ineffectual effort to do so on March 3d; that plaintiff wrongfully and unlawfully terminated the lease by serving notice on the defendants March 13th; that the payment of $266.88 for repairing the shovel more than offset the second instalment of $200, which was not due until seven days after February 25th when the shovel was in workable condition, and that defendants were not in default of any instalment of rent. Judgment was rendered in favor of the defendants for the sum of $266.88 upon their counterclaim.

[2, 3] The trial court correctly determined that the defendants were entitled to credit for the sum of $266.88 which they necessarily expended in repairing the shovel to render it suitable for the service for which it was rented. The lease should be construed in the light of sections 1955–1957 of the Civil Code, which provide that a lessor of personal property is required to "put it into a condition fit for the purpose for which he lets it", and to deliver it to the lessee suitable for operation; that the lessee shall bear all expenses *"during its use by him";* and that if the lessor fails to deliver the property in a suitable condition for use, the lessee "may expend any reasonable amount necessary to make good the letter's default". The last-cited section provides that notice of such necessary expense must be imparted to the lessor only when it "can conveniently be given".

[4] In the present case the plaintiff was previously notified of the defect in the machine and failed to repair it. He left the state of California the day before it was delivered. The defendants did not have his address and were therefore unable to notify him of the cost of the necessary repairs. It became necessary to make the repairs to place the shovel in condition to be used for the purpose for which it was leased. The defendants were authorized under such circumstances to expend a reasonable amount in repairing the machine. It is not contended the sum expended is excessive.

[5-7] We are of the opinion the trial court correctly construed the lease to be "for a period of thirty *operating days*", as distinguished from calendar days. The contract defines an "operating day" as not less than four, nor more than twenty-four hours "working with the shovel". The lease specifies that the lessees shall pay for each "operating day" the sum of $35 as rental for the property, aggregating $1,050. That rental was to be paid in the following instalments, to-wit, $200 upon the execution of the contract, which was paid; $200 "when the operating test begins which shall not be later than seven (7) days after the shovel is returned to the above mentioned property". This last-quoted provision should be construed to mean the second instalment was due not later than seven days after the shovel was delivered to the lessees *in proper condition to be used* for the purpose for which it was rented. It was ready for use February 25th. It may be said the operating test began on that day. At least the court so found. Since the second instalment was due seven days after

the machine was delivered ready for use, it became due March 3d. But the defendants were not then in default for failure to pay plaintiff that sum because they had previously expended for his benefit in repairing his shovel the sum of $266.88. They offered him the receipted bill for $216.88 in payment of that second instalment, which he refused. They were therefore not in default, and the court correctly so found, but failed to credit the plaintiff upon the defendants' counterclaim with the amount of that second instalment.

[8] The court correctly found that the $650 instalment was not due, for the reason that the time for its payment was extended under the terms of the contract by an occurrence "beyond the control of man" which prevented them from operating the prospecting enterprise. The contract specifically provides that "said lessees are hereby excused from the performance of any term, * * * *or payment,* when the performance of the same is prevented by the acts of God, * * * or the elements beyond the control of man". Mr. Magee testified that:

> "On March 3rd we operated again * * * until we broke the pinion that drove the chain drive to the screen of our washing machine. * * * Then we had to stop, took off that pinion, brought it to town, had a new one cast, and took it back. In the meanwhile the Happy Valley ditch was broken during that heavy rain, right near a box up there, when all the water to Igo was cut off. * * * There wasn't any water to work with. * * *
>
> "Q. When was the next operating made? A. * * * March 11th."

Clearly the defendants had no control over the storm which broke the ditch upon which they were dependent for their supply of water to operate their washing machine. That calamity over which they had no control had the effect, under the express provisions of the contract, to extend the time for paying the third instalment of $650. It was not due when the plaintiff served notice of the termination of the lease. Assuming that the ten-day period for paying that last instalment began to run the day after the operations commenced on February 25th, only six days elapsed before the ditch broke and the water failed. The defendants were not again able to resume operations until March 11th, after which date they were entitled to four days more in which to pay that last instalment, which would expire March 14th. In the meantime notice of the termination of the lease was served on March 13th. The $650 payment was not then due. On account of that notice the defendants ceased working on the following day and abandoned the enterprise. They did not oppose the plaintiff taking immediate possession of the mine and equipment.

Moreover, the plaintiff wrongfully terminated the lease for the alleged default of payment of the second instalment of $200, for the reason that they had previously expended in his behalf more than that sum in repairing his shovel to place it in workable condition. They were not then in default, as we have previously stated. The plaintiff's notice of alleged default contained only the specification of failure to pay that second instalment. The contract requires the notice to contain the "specific particulars" in which it is claimed the contract has been breached. That notice did not specify the failure to pay the last $650 instalment as ground for termination of the lease. Evidently the plaintiff did not then consider the defendants in default in that regard.

The lease contemplated that the defendants would be permitted to prospect the claim for mineral for a period of *thirty operating days with the shovel* at $35 per working day, aggregating the sum of $1,050. They actually operated only five days without any proved profit. To permit the plaintiff to terminate the lease under such circumstances and recover the final instalment of rent after giving notice of the termination of the lease before the payment was due, would result in unjust enrichment on his part in spite of his own wrong. Such a construction of the contract is not reasonable.

The plaintiff is entitled to credit on the defendants' counterclaim for the amount of the second instalment of $200, which the court failed to allow him. That credit leaves the defendants entitled to judgment for $66.88 and costs taxed at $13.75. The judgment is modified accordingly.

As so modified, the judgment is affirmed, neither party to recover costs on appeal.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; HOUSER, J.; EDMONDS, J.

14 Cal.2d 41

## COLLINS v. BRIDGE INV. CO. et al.

### S. F. 16129.

Supreme Court of California.
July 18, 1939.

Rehearing Denied Aug. 17, 1939.

**Appeal and error** 🔑**480**

Where to prevent sale under trust deeds pending appeal appellant filed petition for supersedeas, Supreme Court granted show cause order staying proceedings until further order, and subsequently directed issuance of supersedeas on giving bond within ten days but bond was not given, sale made after expiration of ten-day period was valid notwithstanding appellant sought rehearing of order requiring stay bond and subsequent to sale procured two extensions of time for furnishing of bond.

◆

In Bank.

Proceeding by Clarice McC. Collins against Bridge Investment Company and others. From an adverse decree, plaintiff appeals. On motion for an order vacating a sale of real property pending appeal.

Motion denied.

Alfred J. Hennessy, of San Francisco, for appellant.

Elliot W. Seymour, of San Francisco, for respondents Bridge Inv. Co. and Harry B. Allen.

D. C. Murphy, of San Francisco, for respondents Crocker First Nat. Bank and Scales & Ehlers.

PER CURIAM.

Appellant moves for an order vacating a sale of real property made pending appeal in alleged violation of a stay order granted by this court.

On August 31, 1938, the superior court in and for the city and county of San Francisco made its order terminating a moratorium decree theretofore entered and directing that sales under certain trust deeds "proceed as provided by law." The defendant in the action, as owner of the property, thereupon noticed an appeal to this court from said order. Shortly thereafter, and to preclude a sale of the property pending appeal, the appellant filed with this court a petition for a writ of supersedeas. Upon consideration of the petition, this court on September 26, 1938, issued its order directing the respondents to show cause on October 4th why a supersedeas should not issue as prayed. The order to show cause thus issued by the court made no provision for a stay. However, two days after the issuance of such order and on September 28, 1938, counsel for the appellant presented for filing, after having received permission therefor, a form of order to show cause which contained a provision for a stay in the following language: "And in the meantime and until further order of the Supreme Court, it is also ordered that all proceedings for the sale of the property described in said petition and upon the said orders appealed from, be and the same are hereby stayed." This latter order was served on the court below and the respondents. Contrary to the appellant's contention, this order, assuming it to be properly in the case, did not furnish a continuous stay pending approval of a stay bond, hereinafter to be discussed, so as to assertedly preclude and make illegal any sale of the property pending the appeal. The stay so relied on by appellant was but temporary in character and expressly made operative only "until further order of the Supreme Court." This court made its further order in the matter when on October 13, 1938 (amending an earlier order of October 7th) it directed issuance of a writ of supersedeas "upon the appellant giving a bond in the sum of three thousand dollars ($3000) within ten days of the date hereof. The sureties, form and conditions of said bond to be approved by the Presiding Judge of the Superior Court of the City and County of San Francisco, or by some other Superior Court Judge designated by special order by said Presiding Judge, upon five (5) days written notice to the counsel for each of the defendants in said action."

The bond so required to be furnished never has been filed by the appellant. Approximately ten months have expired and the transcript upon the appeal likewise has not been filed. The ten-day period prescribed for the giving of the bond upon which the supersedeas was conditioned, expired on October 23, 1938, and the respondents proceeded to and did sell the property on November 2, 1938. At that time no bond had been furnished or filed. It is this sale that the appellant now seeks by this motion to vacate and set aside on the ground that it was in violation of a stay granted by this court.

The foregoing chronological statement of the facts definitely indicates that there was no stay in existence at the time of such sale. The supersedeas ordered issued on October 13th was conditioned upon appellant's furnishing an approved bond within ten days. As stated, said bond was not so furnished nor has it ever been filed down to the present time. As a result, the supersedeas has not issued. The fact that appellant sought a rehearing (which was denied) of the order requiring the stay bond and that subsequent to the sale, which was made in default of the furnishing of the bond, appellant sought and procured two extensions of time for the furnishing of such bond and that the superior court on November 29, 1938, prescribed the terms of such bond, is immaterial. The sale already had been made for default in furnishing the bond and the subsequent extensions of time therefor and the fixation of the terms thereof were undoubtedly granted and ordered without knowledge of the fact that the sale had been made because of appellant's earlier default in the premises. They were idle acts. The issue was moot. Moreover, appellant's last attempt to secure a further extension of time was refused on December 5, 1938, and, as indicated, no attempt has been made to file the bond though more than six months have since expired.

We conclude, therefore, that there was no stay in existence at the time of the sale on November 2, 1938, and that the motion to vacate the sale must be, and it is, denied.

---

14 Cal.2d 56

## WILSON v. CHEROKEE DRIFT MINING CO. et al.

Sac. 5219.

Supreme Court of California.

July 21, 1939.

**1. Corporations ⇨175**

A corporation has the right to amend its articles to provide for the power of assessment.

**2. Corporations ⇨39**

One who becomes a stockholder of a corporation makes his contract in anticipation of any possible changes in the law under the state's reserved power.

**3. Constitutional law ⇨154(2), 299**
**Corporations ⇨175**

An assessment of 5 per cent. on all stock of a corporation to pay corporate debts incurred prior to amendment of corporate article to permit assessment was not unconstitutional as a denial of due process of law, and an impairment of obligation of contract as respects stock which was issued prior to amendment of corporate articles, since stockholder received stock with knowledge that corporation could by amendment of its articles provide for stock assessments to pay debts accruing prior to amendment.

**4. Corporations ⇨145**

The statute providing that certain restrictions, liens, or powers, including power of assessment, shall not be effective against transferee of shares unless they are stated on face of certificate, was intended to protect a transferee who purchases in reliance on face of certificate from undisclosed liens, powers, or restrictions which vitally affect his shares. Civ.Code, § 326, subd. 8.

**5. Corporations ⇨145**

The statute providing that power to levy assessments shall not be effective "against a transferee" of shares unless such power is stated on face of stock certificate is limited to "transferees" who take the stock by transfer of certificate from an existing shareholder after power is in effect, and has no application to a stockholder who was issued new shares of stock by corporation and after issuance articles of corporation were amended to permit levying of stock assessments, since such person is not a transferee. Civ.Code, § 326, subd. 8.

[Ed. Note.—For other definitions of "Transferee," see Words & Phrases.]

◆

In Bank.

Appeal from Superior Court, Butte County; Raglan Tuttle, Judge.

Action to cancel an assessment on shares of stock and to enjoin the sale of stock for the enforcement thereof by Alex E. Wilson against the Cherokee Drift Mining Company, a corporation, Alexander Logie, Charles B. Griggs, A. Jones, John Doe, Richard Roe, and Helen One. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Sterling Carr, of San Francisco, for appellant.

J. F. Good, of Oroville, for respondents.

PER CURIAM.

This is an action to cancel an assessment on shares of stock and enjoin the sale of stock for the enforcement thereof.

Defendant is a California corporation, with a capital stock of 500,000 shares of $1 par value. In 1935, plaintiff recovered a judgment against certain shareholders and acquired their stock in satisfaction thereof, new certificates being then issued to him in the amount of 46,666 shares. At that time the stock was nonassessable.

In May, 1937, the articles were amended to permit the levy of assessments by the board of directors. At that time the corporation owed current accounts of over $3,000, and was liable to its president, Alexander Logie, on promissory notes given for cash advances in the sum of $13,312.32. Logie held 276,712 shares.

On July 9, 1937, the board levied an assessment of five cents per share on the outstanding stock. At the same time it adopted a resolution authorizing acceptance of any part of the promissory notes held by Logie as payment of his assessment. When enforcement of the assessment was attempted, plaintiff protested, and thereafter brought this action to annul it. It is conceded that Logie, the president, controlled the board of directors, but no fraud or breach of trust was charged, and the validity of the debts was not questioned. The lower court gave judgment for defendant corporation and plaintiff appealed.

[1, 2] The first and principal contention of plaintiff is that the assessment in this case involves a denial of due process of law, and an impairment of the obligation of contract. The right of the corporation to amend it articles to provide for the power of assessment is of course conceded, and it is likewise conceded that one who becomes a stockholder makes his contract in anticipation of any possible changes in the law under the state's reserved power (see, generally, Ballantine & Sterling, California Corporation Laws, 1938 Ed., p. 5; Heller Inv. Co. v. Southern Title & Trust Co., 17 Cal.App.2d 202, 61 P.2d 807; but it is asserted that to assess the stockholder for debts existing prior to the amendment of the articles is an unconstitutional application of the law.

Plaintiff relies upon Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148, a case wholly distinguishable, for there the attempt was made to apply a new law imposing a special stockholders' liability to creditors for debts incurred prior to the law's enactment. This court pointed out that at the time the debts were contracted the creditors had no such right against the stockholders, and declared that to impose this liability retroactively would be a denial of due process. This case, dealing with liability to creditors, has no relevancy where, as here, we are concerned with the interrelations of the corporation and its stockholders. See Schroeter v. Bartlett Syndicate Building Corp., 8 Cal.2d 12, 63 P.2d 824; Heller Inv. Co. v. Southern Title & Trust Co., supra.

[3] When plaintiff became a stockholder he knew that under the law then in existence the power of assessment could be conferred on the corporation by amendment of the articles, and that this power could be exercised to raise funds for the corporation, for the purpose of paying any debts of the corporation owed at the time the assessment was levied, regardless of when they were incurred. No violation of his constitutional rights was involved in the making of that assessment.

[4, 5] The other contention of plaintiff is that the assessment was void because of a failure on the part of the corporation to comply with the terms of section 326, subdivision 8, of the Civil Code. This section provides that certain restrictions, liens or powers, including the power of assessment, shall not be effective "against a transferee" of shares unless they are stated on the face of the certificate. The provision was intended to protect a transferee who purchases in reliance on the face of the certificate from undisclosed liens, powers or restrictions which vitally affect his shares. See Ballantine & Sterling, California Corporation Laws, 1938 Ed., pp. 132, 133. Obviously, it does not apply to every shareholder, but is limited to transferees, that is, those who take the stock by transfer of the certificate from an existing shareholder after the restriction or power is in effect. Persons to whom stock is issued by the corporation cannot correctly be deemed "transferees". Plaintiff was at one time a transferee of his stock, but following the transfer new certificates were issued to him by the corporation, and thereafter the amendment was adopted and

the assessment made. At the time of the amendment giving the power of assessment he was a stockholder with full knowledge of all the proceedings. The provision was therefore entirely inapplicable to him.

The judgment is affirmed.

14 Cal.2d 47

## GODDARD v. SECURITY TITLE INS. & GUARANTEE CO. et al.

L. A. 16709.

Supreme Court of California.

July 20, 1939.

Rehearing Denied Aug. 18, 1939.

**1. Limitation of actions 🔑58(4)**

A cause of action to recover on proportional liability of stockholders of trust company for trust company's payment of funds to third person in violation of trust agreement was not barred by three year statute of limitations where the trust agreement was signed by the trustee October 23, 1930, and the action was filed on October 21, 1933, notwithstanding that the money was delivered to the trustee on September 24, 1930, since liability was created at time trust agreement was signed by the trustee and not when the money was first delivered to the trust company. Code Civ.Proc. § 359.

**2. Judgment 🔑540**

Under the general doctrine of "res judicata," a final judgment rendered on the merits by a court having jurisdiction of the cause is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between them on the same cause of action.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

**3. Judgment 🔑562**

A judgment not rendered on the merits does not operate as a bar to a subsequent action.

**4. Judgment 🔑572(2)**

A judgment based on the sustaining of a special demurrer for technical or formal defects is not "on the merits" and is not a bar to the filing of a new action.

[Ed. Note.—For other definitions of "Merits," see Words & Phrases.]

**5. Judgment 🔑572(2)**

A judgment given after the sustaining of a general demurrer on a ground of substance may be deemed a "judgment on the merits" and conclusive in a subsequent suit.

**6. Judgment 🔑572(2)**

A judgment given after the sustaining of a general demurrer which sets up the failure of facts alleged to establish a cause of action may be deemed a "judgment on the merits" and conclusive in a subsequent suit in which the same facts are pleaded.

**7. Judgment 🔑572(2)**

A judgment given after the sustaining of a general demurrer is not a "judgment on the merits" and does not constitute a bar to a subsequent action where the defects set up by demurrer are technical or formal and can be eliminated by different pleading or correction of omissions and allegation of facts constituting a good cause of action in proper form, and where such a new and sufficient complaint is filed in the subsequent action.

**8. Judgment 🔑570(12)**

A judgment of dismissal for want of prosecution has the same effect as a nonsuit and is not considered "on the merits" and is not a bar to another suit on the same cause of action, unless the record shows that there was an actual determination on the merits.

**9. Judgment 🔑570(5)**

In action against stockholders of trust company to recover on their proportional liability for loss sustained by plaintiff when trust company paid moneys to third person in violation of trust agreement, judgment of dismissal in prior action on same cause of action against trust company on ground that complaint was framed on theory of conversion rather than an action on the case and that it was uncertain and insufficient in its pleading of causal connection between the violation of instructions by trustee and the resulting loss to the plaintiff was not "on the merits," and hence not res judicata on issue of stockholders' liability, notwithstanding that order of federal court stated that action was "dismissed with prejudice."

**10. Judgment 🔑570(5)**

The intention of the court as gathered from its order or other source is not the test of the effect of the judgment on subsequent actions, and, if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial, the words "with prejudice" in order of dismissal adding nothing to the effect of the judgment.

**11. Judgment** ⚷560

Whether judgment is res judicata is determined by its character and nature of action in which rendered, not court's intention to make determination on merits barring subsequent action.

**12. Judgment** ⚷570(6)

A judgment of dismissal entered by consent or stipulation of the parties after compromise or settlement of the suit is entered "with prejudice" and is a bar to a subsequent suit where the dismissal is intended to operate as a retraxit and end the litigation.

**13. Corporations** ⚷225

The peculiar type of stockholders' liability formerly in force in California made stockholders directly and primarily liable for the obligations of the corporation and independently of the corporation.

---

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Herbert M. Goddard against the Security Title Insurance & Guarantee Company and others, as stockholders of the Metropolitan Trust Company, to recover on their proportional liability for the debts of the corporation. Judgment for plaintiff in the amount of $69,842.13, and defendants appeal.

Affirmed.

For prior opinion, see Cal.Sup., 83 P.2d 24.

Mitchell, Silberberg, Roth & Knupp and Guy Knupp, all of Los Angeles, for appellant Security Title Insurance & Guarantee Co.

O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, amici curiæ.

H. A. Savage, of Fresno, for respondent.

PER CURIAM.

Upon rehearing, we hereby adopt the former opinion of this court, prepared by Mr. Justice Langdon, with certain changes hereinafter appearing. The said opinion reads as follows:

"This is an action against stockholders of Metropolitan Trust Company, a corporation, to recover on their proportional liability for the debts of the corporation. The obligation arose in 1930, before the repeal of our statutory provision governing this liability. The cause of action arose out of the alleged violation by the corporation of instructions concerning the use of trust money paid to it by plaintiff.

"In 1930, Earle C. Dingwell, nephew of plaintiff, owned real estate and personal property in southern California, considered to be worth about $1,600,000. The properties were encumbered with a number of mortgages, trust deeds and other liens, and these obligations of Dingwell, together with the claims of unsecured creditors, amounted to about $1,000,000. The creditors were pressing for payment, and loss of the properties was imminent, when Dingwell evolved a plan to place them in trust with Metropolitan Trust Company, to hold and administer them and to pay claims. As part of the plan, Dingwell and another party interested were each to provide $50,000 in cash. Dingwell approached plaintiff, his uncle, who resided in Philadelphia, to borrow the money, and plaintiff requested that the proposal be submitted to his legal adviser. The trust plan was accordingly presented, followed later by the completed trust indenture, setting forth certain specific terms and conditions regarding releases by creditors, clearing of most of the encumbrances except first deeds of trust, etc. This was signed and forwarded to the trust company in California on September 12, 1930. On September 24, 1930, plaintiff transferred to the company the sum of $49,280, ear-marked 'Dingwell-Goddard Trust'. In response to requested instructions as to use of the funds, plaintiff wired the company on October 17, 1930: 'Deliver to Earle C. Dingwell funds on deposit to my credit if all conditions of trust are satisfactorily arranged.' The money was thereafter expended by the trust company, but a number of the trust conditions were never performed. The trustee failed to obtain title to the personal property, permitted unauthorized encumbrances, failed to secure required releases, and in various other ways did not carry out the terms of the agreement. Ultimately the scheme failed in its object, foreclosure suits were instituted, and the properties were lost. Plaintiff was unable to recover the money lent, and the security therefor having been wiped out, he brought suit.

"Two actions were commenced. The first, filed in October, 1932, in the federal District Court, was against the Metropolitan Trust Company. The complaint was framed on a theory of conversion. To plaintiff's second amended complaint, filed in March, 1933, the defendant demurred, generally and specially, on a number of grounds. The demurrer was sustained with right to apply for leave to amend. But later, when an amended complaint was tendered, the court refused to permit its filing, and on June 1, 1934, judgment was entered, in which it was ordered that the action be 'dismissed with prejudice'. Appeal was taken and the Circuit Court of Appeals, with one judge dissenting, upheld the judgment, mainly on the theory that an action for conversion would not lie under the facts alleged, and that the remedy, if any, was an action on the case, the recovery being limited to the damages proximately resulting from the alleged violation of instructions. See Goddard v. Metropolitan Trust Co., 9 Cir., 82 F.2d 902. The dissenting judge considered the proposed amended complaint sufficient, and expressed himself forcefully and at length to that effect. See 82 F.2d at page 913.

"On October 21, 1933, while this action against the corporation was pending in the federal court, plaintiff filed the present suit against defendants, stockholders of the corporation, in the superior court of Los Angeles, alleging substantially the same cause of action with corrected pleadings. A demurrer was overruled, and the case was set to be tried November 2, 1936. In June the Circuit Court of Appeals handed down its decision, and thereupon defendants amended their answer to plead the defense of res judicata as a complete bar to the action. The case was tried, certain amendments were allowed to conform to proof, and the matter submitted. On May 26, 1937, the trial court gave judgment in favor of plaintiff against defendants in the total amount of $69,842.13. Defendants appealed.

[1] "On the merits of plaintiff's claim that the corporation violated instructions concerning the use of his money, thereby causing the loss, we see no ground for disturbing the conclusion of the court below. The evidence was voluminous, and subject, as is usual in such cases, to different inferences, but those drawn by the trial court and expressed in its comprehensive findings are supported by sufficient evidence, and it is unnecessary to review the record at length. Nor do we find any substantial merit in the defense of the statute of limitations. In our opinion the trial court correctly placed the creation of the liability at the time the trust agreement was signed by the trustee, October 23, 1930. The action was filed on October 21, 1933, within the three-year period prescribed by section 359 of the Code of Civil Procedure. Defendants' plea is based upon the contention that the liability arose on September 24, 1930, when the money was first delivered to the corporation. But the action was for damages for violation of the terms of the agreement, and no liability of this type could arise prior to the signing of the agreement. It follows that the action was brought in time.

[2-8] "The major defense, and the only one which requires extended discussion, is that the judgment in the prior action in the federal court is res judicata and therefore a complete bar to the present action. To determine this point it may be desirable first to review some of the principles governing the effect of judgments of dismissal and judgments entered after the sustaining of demurrers without leave to amend.

"First, a final judgment, rendered upon the merits by a court having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between them on the same cause of action. This is the general doctrine of res judicata. See 2 Freeman on Judgments, 5th Ed., § 627, p. 1321 et seq.; von Moschzisker, Res Judicata, 38 Yale L.J. 299; Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 258 P. 387. Second, a judgment not rendered on the merits does not operate as a bar. Campanella v. Campanella, 204 Cal. 515, 269 P. 433; 2 Freeman on Judgments, 5th Ed., § 723, p. 1530; 34 C.J. 774, § 1193. Third, a judgment based upon the sustaining of a special demurrer for technical or formal defects is clearly not on the merits and is not a bar to the filing of a new action. 2 Freeman on Judgments, 5th Ed., § 745, p. 1569; 34 C. J. 797, § 1219. Fourth, judgments based upon sustaining a general demurrer have given rise to an apparent conflict of decision, and careful distinctions must be drawn between the cases. See von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318 et seq.; Clark, Code Pleading, p. 367. A judgment given after the sustaining of a general demurrer on a ground of substance, for example, that an absolute defense is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit; and the same is true where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action. 2 Freeman on Judgments, 5th Ed., § 746, p. 1571; Erganian v. Brightman, 13 Cal.App.2d 696, 57 P.2d 971; von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318, and cases cited. But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L.R.A. 673; Terry v. Hammonds, 47 Cal. 32; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; 2 Freeman on Judgments, 5th Ed., §§ 747, 748; von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318. This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action. 2 Freeman on Judgments, 5th Ed., §§ 734, 735; von Moschzisker, Res Judicata, 38 Yale L.J. 299, 318. Fifth, an ordinary judgment of dismissal, for example, for want of prosecution, has the same effect as a nonsuit, that is, is considered not on the merits and not a bar to another suit on the same cause of action, unless the record shows that there was an actual determination on the merits. Everts v. Blaschko, 17 Cal.App.2d 188, 61 P.2d 776; Matteson v. Klump, 100 Cal.App. 64, 279 P. 669; Campanella v. Campanella, 204 Cal. 515, 269 P. 433; 2 Freeman on Judgments, 5th Ed., § 753, p. 1582.

[9] "Applying these principles to the case before us, it is apparent that the prior judgment of dismissal by the federal district court was entered primarily on two grounds, first, that the complaint was framed on a theory of conversion rather than an action on the case; and second, that it was uncertain and insufficient in its pleading of causal connection between the violation of instructions by the trustee and the resulting loss to the plaintiff. This is the necessary conclusion from a reading of the minute order of the court, as well as from a study of the opinion of the Circuit Court of Appeals, hereinabove mentioned. The actual order was merely that 'said demurrer is sustained', without expressly stating whether the grounds of special or of general demurrer were controlling. But assuming that the court was also sustaining the general demurrer, the minute order shows that it was not on a matter of substance which could not be remedied by another pleading. The court's determination amounted to nothing more than that the plaintiff had failed, in the two respects mentioned above, to establish a right of recovery against the defendant by that particular complaint. The judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not res judicata.

[10, 11] "Defendants, however, rely heavily on the argument that the federal court *intended* its judgment to be a bar, as indicated by the form of the order, which states that the action was 'dismissed with prejudice'. The contention is that the court was determined to end the litigation, that it was deciding the cause on the merits, and expressly made its decision a bar to another action by the addition of the words 'with prejudice'.

"This view is in our opinion based upon a misconception of both the power of the court and the ordinary meaning and effect of a dismissal 'with prejudice'. In the first place, if the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of res judicata would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of proposed order drafted by successful counsel. Suppose, for example, a complaint were filed, stating a good cause of action and sufficient in every respect except that some minor allegation appeared uncertain or ambiguous. Suppose further that a special demurrer were filed on this ground alone, and the court sustained the demurrer without leave to amend, and ordered the action dismissed. The plaintiff could appeal and doubtless have the judgment reversed. But he would not be limited to that remedy. He would be free to file a new action within the period of the statute of limitations, and a plea of res judicata, that is of prior adjudication on the merits, would completely fail. Now, what difference would there be if the court in such a situation were to add the words 'with prejudice' to its order of dismissal? Such a statement, if it has any definite meaning, suggests merely that the court believed that the judgment would finally conclude the controversy. But it is the nature of the action and the character of the judgment that determines whether it is res judicata. The intention of the court to make a determination on the merits may be important, but if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial. The words 'with prejudice' add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court.

"We think this is the principle underlying the case of Matteson v. Klump, 100 Cal.App. 64, 279 P. 669, where the court said: 'As announced by decisions of the Supreme Court of this state, the ordinary rule is that the dismissal of an action does not operate as a bar to another action for the same cause of action as was stated in the action which was dismissed * * but specifically, where the dismissal of an action does not purport to go to the merits of the case, the trial court has no authority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated.' The court then, in affirming the judgment struck out the words 'with prejudice'. A similar result was reached in Steffens v. Rowley, 10 Cal.App.2d 628, 52 P.2d 493. See, also, Lindblom v. Mayar, 81 Wash. 350, 142 P. 695; Lower v. Forelich, 151 Minn. 552, 185 N.W. 940. If the trial court has no authority to add the term 'with prejudice' to a judgment not on the merits, it necessarily follows that the unauthorized addition of this term cannot so radically change the effect of the judgment as to make it a bar even though it is not on the merits.

"In the instant case we have, therefore, a judgment of dismissal based upon a demurrer sustained for defects of form, under circumstances where it was possible to plead a good cause of action in another suit. This type of judgment, under the rules we have discussed, is not res judicata.

[12] "The authorities which purport to hold that judgments of dismissal 'with prejudice' are res judicata are nearly all distinguishable upon careful examination. One type of case is based upon that situation where by statute or practice this kind of judgment is used after a determination on the merits, and it is a bar, not because of the use of the words 'with prejudice', but because the judgment was in fact on the merits and that form was used to describe it. See 2 Freeman on Judgments, 5th Ed., § 752, p. 1581. Other cases are concerned with dismissals by consent or stipulation of the parties, after compromise or settlement of the suit, where the dismissal is intended to operate as a retraxit and end the litigation. In such cases the judgment of dismissal is entered 'with prejudice' and is of course a bar to a subsequent suit. See Pulley v. Chicago, etc., R. Co., 122 Kan. 269, 251 P. 1100; Morgan v. Hart, 84 Wash. 496, 147 P. 26; Hargis v. Robinson, 70 Kan. 589, 79 P. 119; cf., Lamb v. Herndon, 97 Cal.App. 193, 202, 275 P. 203; Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 303, 72 P.2d 895."

[13] The view we take on the point just discussed makes it inappropriate to decide whether the doctrine of res judicata is rendered inapplicable by reason of difference in parties to the two actions. In the prior action the plaintiff sued the corporation; here he sues the stockholders. It was an established rule in California that the peculiar type of stockholders' liability formerly in force in this state, upon which this action is founded, made stockholders directly and primarily liable for the obligations of the corporation. See Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335; Paladini, Inc., v. Superior Court, 218 Cal. 114, 21 P.2d 941; 9 Cal.L.Rev. 495; 2 So.Cal.L.Rev. 370. Opposed to the conclusion reached in these cases is the decision in Triano v. F. E. Booth & Co., 120 Cal.App. 345, 8 P.2d 174, in which

it was held that an exception to the rule exists where the prior action is terminated by judgment in favor of the corporation. The theory of the decision was that the liability of the stockholders depended upon the culpability of the corporation, and that if the corporation was exonerated the stockholders could not be liable. However, since we have already held that the judgment is not res judicata because not on the merits, no further consideration of this other point is indulged.

The judgment is affirmed.

---

33 Cal.App.2d 692

## LACOE v. SAN DIEGO COUNTY.

Civ. 2304.

District Court of Appeal, Fourth District, California.

July 18, 1939.

Hearing Denied Sept. 14, 1939.

**1. Taxation ⚷219**

Taxation of stock certificates so far as their value represents corporation's property outside state is permitted by statute exempting from taxation shares of stock representing value of corporation's property assessed for taxes. Pol.Code, § 3608; Const. art. 13, § 14, amended in 1933.

**2. Constitutional law ⚷229(1)**

The fact that property would bear no tax burden, though similar property is taxed, unless separately classified for tax purposes, is sufficient ground or basis for such classification, and statute imposing tax thereon is not unconstitutional as denying equal protection of laws. U.S.C.A.Const. Amend. 14.

**3. Constitutional law ⚷229(1)**
**Taxation ⚷193**

The statute forbidding taxation of stock certificates so far as their value represents corporation's property outside state, where assets thereof are present in state, is not unconstitutional as denying equal protection of laws or discriminating against owners of such certificates with respect to their rights as United States citizens. Pol.Code, § 3608; U.S.C.A.Const. Amend 14.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Ralph D. Lacoe against the County of San Diego for refund of taxes alleged to have been illegally collected. Judgment for defendant, and plaintiff appeals.

Affirmed.

Holbrook & Tarr and W. Sumner Holbrook Jr., all of Los Angeles, for appellant.

James B. Abbey, Dist. Atty., and V. C. Winnek, Deputy Dist. Atty., both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to secure a refund of taxes alleged to have been illegally collected. The plaintiff owned stock in certain corporations, the assets of which were located wholly or in part outside of California. For the years 1933–34, 1934–1935, 1935–1936 these stock certificates were assessed in so far as their value represented property outside of this state. In due course, this action was brought resulting in a judgment in favor of the county, from which the plaintiff has appealed.

[1] Appellant's first contention is that section 3608 of the Political Code, properly interpreted, invalidates such a tax as the one here in question and requires a reversal of the judgment. In two cases the Supreme Court of this state has held in favor of the legality of such a tax. Chesebrough v. San Francisco, 153 Cal. 559, 96 P. 288, 290; Canfield v. County of Los Angeles, 157 Cal. 617, 108 P. 705. In the first of these cases, the court said: "Section 3608, while declaring that no shares of the stock shall be assessed, is to be read in the light of the preliminary language of the section declaring the reason why it should not be, and was intended to mean only that as shares of stock represent the value of the property of the corporation, so when all the property of the corporation in the state is taxed it would be double taxation to assess both, and that, where all the property of the corporation was assessed, the shares of stock should not be. It was not meant or intended that if less than the aggregate value of the property of the corporation was assessed in this state the actual value of the corporate stock in excess of the value of the corporate property so assessed should not be taxed here. It means only that when the aggregate property of the

corporation is assessed in this state shares of stock of the corporation shall not be assessed, but that, if all such property is not here assessed, the actual value of such stock, less the value of the corporate property which is assessed here, shall be taxed."

In that case the court further said: "But section 3608 cannot be extended so as to exempt such shares from taxation when all the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction. Neither is it of moment that the tangible property of the corporation is situated in some other state and has there been taxed. The fact that some of the property of the corporation is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. This does not constitute taxation of all the property of the corporation within the terms of the section. The inhibition of double taxation only applies to such taxation in the same state or government."

The appellant contends that these cases are no longer controlling, or in point. It is argued that the reason given in the Cheesebrough case for upholding such a tax was that a section of the state Constitution required all property to be taxed, and that this reason has now been removed by the addition of section 14 to article XIII of the state Constitution in 1933, a part of which provides that the legislature may exempt any kind of personal property from taxation. Aside from other considerations, it may be observed that the portion of the opinion in the Cheesebrough case to which appellant refers merely commented on what would be the situation if section 3608 were interpreted as exempting property of this nature from taxation. However, the court interpreted that section as permitting the taxation of such property and the decision in these two cases is still controlling on the first question here raised by the appellant.

[2, 3] It is next argued that section 3608 of the Political Code, if interpreted as permitting the taxation of such property as this, which merely represents property situated in another state, violates the equal protection clause of the fourteenth amendment to the federal Constitution, U.S.C.A., and is also discriminatory against the appellant as a citizen of the United States, in a sense forbidden by that amendment. While it is conceded that property may be classified for the purposes of taxation it is argued that the taxing of corporate shares in this state, to the extent of the value of assets of the corporation which are without the state, results in a classification which must be based solely on the location of the assets of the issuing corporation or based solely upon the admitted impossibility of taxing in this state tangible property which is located out of the state, and that either of such classifications is arbitrary, unreasonable and based upon no ground of difference which has a fair and substantial relation to the object of the legislation. The appellant overlooks the fact that such a classification may be based upon the ground that such shares of stock represent valuable property in this state which would not otherwise be taxed here, although similar property, consisting of corporate shares representing assets which are located in this state, are taxed here under other statutes.

In principle, the proposition here advanced was decided adversely to this appellant in the case of Kidd v. Alabama, 188 U.S. 730, 23 S.Ct. 401, 402, 47 L.Ed. 669. In that case, the court said:

"We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. * * *

"It is said that the state may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The state does nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the state's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a state, and the property of the corporation outside it."

The decision in that case was followed and applied in the later case of Darnell v. Indiana, 226 U.S. 390, 33 S.Ct. 120, 121, 57 L.Ed. 267, in which the court said: "The only difference of treatment disclosed by the record that concerns the defendants is that the state taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in Kidd v. Alabama, 188 U.S. 730, 732, 23 S.Ct. 401, 47 L.Ed. 669, 672."

The appellant contends that the two cases last referred to have been overruled by more recent decisions of the United States Supreme Court, citing Senior v. Braden, 295 U.S. 422, 55 S.Ct. 800, 79 L.Ed. 1520, 100 A.L.R. 794; Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 296 U.S. 113, 56 S.Ct. 31, 80 L.Ed. 91; Colgate v. Harvey, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54. It is also contended that the instant case falls within the rules laid down in Selliger v. Commonwealth of Kentucky, 213 U.S. 200, 29 S.Ct. 449, 53 L.Ed. 761.

In Selliger v. Commonwealth of Kentucky, supra, certain whiskey had been shipped to Germany and the state of Kentucky attempted to tax German warehouse receipts which had been issued therefor. It was held that while the warehouse receipts represented the whiskey the whiskey itself, having been exported, could not be taxed under constitutional provisions and that, therefore, the warehouse receipts, representing the same thing, were subject to the same rule.

In Senior v. Braden, supra, a tax on the income from certificates of beneficial interest in a trust, the corpus of the trust being land both in and out of the state, was held invalid on the ground that the certificates constituted interests in land, it having been conceded that the state had no power to tax interests in land beyond its borders. The only question presented in that case was whether or not these certificates constituted interests in land. Conceding that the interests represented by such trust certificates may be similar in some respects to the interests represented by shares of stock in a corporation, there are also marked differences between the two and many differences between the laws affecting real estate and those affecting corporations and corporate stock. Nothing in this case can be taken as overruling the principles laid down in Kidd v. Alabama, supra. Moreover, in arguing that a different rule should be applied in that particular case Justice Stone, in the dissenting opinion in Senior v. Braden, supra, says [295 U.S. 422, 55 S.Ct. 804, 79 L.Ed. 1520, 100 A.L.R. 794]: "No one would doubt the constitutional power of a state to tax its residents on their shares of stock in a foreign corporation whose only property is real estate or chattels located elsewhere."

In Schuylkill v. Commonwealth of Pennsylvania, supra, a tax on the assets of a trust company was held invalid because the law permitted a deduction on account of shares of stock in Pennsylvania corporations which were owned by the trust company, but did not provide for a corresponding deduction on account of shares of a national bank and on account of exempt securities issued by the United States and other federal agencies, which shares and securities were also owned by the trust company. The judgment was reversed entirely because of this discrimination.

In Colgate v. Harvey, supra, the court declared unconstitutional a portion of a Vermont statute which, in levying an income tax, allowed as a deduction certain interest received on money loaned within the state, which deduction was not allowed upon similar income received as interest upon loans made outside of the state. In the same case, however, the court passed upon another provision of the statute imposing a tax upon dividends earned outside of the state, from which tax dividends earned within the state were exempt. This tax was upheld upon the ground that dividends earned within the state were subject to another tax and that, therefore, the classification was a proper one. In that case the court said [296 U.S. 404, 56 S.Ct. 255, 80 L.Ed. 299, 102 A.L.R. 54]: "The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed, and is incapable of exact delimitation. In the great variety of cases which have arisen, decisions may seem to be difficult of reconcilement; but investigation will generally cause apparent conflicts to disappear when due weight is given to material circumstances which distinguish the cases. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied."

And, after discussing the principles of classification of property for tax purposes, the court further said: "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is: Does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject-matter of the legislation?"

Although it was there held that a tax on income from money loaned outside of the state was invalid when similar income from money loaned within the state was not taxed, it was also held that a tax on dividends received from a corporation, which income was earned outside of the state, was valid because a proper basis for classification existed in that such corporate earnings were not subject to a tax to which similar corporate earnings within the state were subject, and because the one tax was compensated for or balanced by the other. The fact that property would otherwise bear no tax burden although similar property is taxed is a sufficient ground or basis for a separate classification of such property for tax purposes, and a statute imposing a tax thereon is not unconstitutional as denying equal protection of the laws. Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87, 118 A.L.R. 1143. In the instant case there was a corresponding and compensating tax where assets of a corporation were present in this state and it follows from the principles laid down in the cases cited that a proper ground for classification existed here, that the statute was not unconstitutional as denying the equal protection of the laws, and that there was no discrimination with respect to any rights to which the appellant was entitled as a citizen of the United States.

If any doubt as to the constitutionality of this tax previously existed, we think that doubt has been removed by two recent decisions of the Supreme Court of the United States. Curry v. McCanless, 59 S.Ct. 900, 83 L.Ed. —; Graves v. Elliott, 59 S.Ct. 913, 83 L.Ed. —.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

---

33 Cal.App.2d 699

## SWEET v. WATSON'S NURSERY et al.

**Civ. 2306.**

District Court of Appeal, Fourth District, California.

July 18, 1939.

**1. Sales ⚷442(11)**

$3,217.50 damages for breach of a warranty to furnish 1,122 Valencia orange trees, of which 848 proved to be navel orange trees, recovery of damages for 40 trees being barred by limitations, was not excessive where trees were planted on 11.7 acres of land which was $600 per acre less valuable than if it had been planted solely with Valencia orange trees. Code Civ.Proc. § 339, subd. 1.

**2. Principal and agent ⚷103(7)**

One who was employed and paid a salary by owners of a ranch on which orange trees were raised was the "agent" of owners and acted within scope of his employment in selling orange trees from ranch's nursery stock.

[Ed. Note.—For other definitions of "Agent," see Words & Phrases.]

**3. Corporations ⚷1**

A corporation with only two stockholders, the stockholders and directors of which held no meetings for four years and all personal business of stockholders was transacted through bank account of corporation, was the alter ego of stockholders who were individually liable for damages for breach of warranty in sale of property of corporation.

**4. Corporations ⚷1**

When a corporation is organized or perpetuated for particular purpose of carrying out plans of partners or associates in business, the courts will look through the corporation to the individuals, and the rule applies irrespective of whether corporation be deemed a "one-man" corporation or a "two-man" corporation.

**5. Principal and agent ⚷23(2)**

Agency may be established by circumstantial evidence.

**6. Crops ⚷5**

In absence of a written reservation in deed, growing crops pass with conveyance of realty.

**7. Appeal and error ⚷1011(1)**

In action for breach of warranty in sale of orange trees, findings that defendants were owners of nursery stock, that nursery stock was sold by their agent, and that their agent acted within scope of his authority, being supported by evidence, were not subject to attack on appeal because of evidence in record which conflicted with that supporting findings.

**8. Sales** ⚿441(1)

In action by purchaser of orange trees for breach of warranty, evidence supported finding that defendants, who owned land on which trees were growing at time of sale by reason of a quitclaim deed not containing a reservation of growing crops or nursery stock, and who paid for care of and received payment for trees sold, were owners of trees at time of sale and liable for breach of warranty.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action for damages for breach of warranty in sale of orange trees by Bryan A. Sweet against Watson's Nursery, a copartnership, Jesse Lee Watson, Joseph H. Watson, and Joseph Walter Watson. From a judgment for the plaintiff, the defendants Jesse Lee Watson and Joseph H. Watson appeal.

Affirmed.

Sloane & Steiner, of San Diego, for appellants.

Fred Kunzel and Renwick Thompson, both of San Diego, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment in an action for damages for breach of a warranty in the sale of orange trees. The case was previously before us for consideration (Sweet v. Watson's Nursery, 23 Cal.App.2d 379, 73 P.2d 284) on an appeal from a judgment in favor of Jesse Lee Watson (Sr.) and Joseph H. Watson, based upon an order granting a nonsuit on the ground that the action was barred by subdivision 1 of section 339 of the Code of Civil Procedure. A resume of the facts surrounding the sale of the trees is adequately set forth in the reported opinion without further recitation here. There is no dispute as to the fact that respondent ordered 1122 Valencia orange trees and that 848 of this number proved to be navels. After a retrial of the issues involved, a judgment was entered in favor of respondent and against appellants in the sum of $3,217.50, based upon the difference in value of the land as planted to navel orange trees and its value had the trees planted thereon proved to have been the variety ordered, namely, Valencia.

[1] In determining the element of damage, witnesses testified that the value of the ranch in 1933, if the trees had all been uniform Valencia orange trees, would have been as much as $900 per acre and that the value of the land with the spotted orchard as it was planted, was as low as $300 per acre. The ranch comprised 11.7 acres. The evidence of damage sufficiently supports the judgment, considering for that purpose the value arising from the Valencia trees which were delivered according to the warranty, and excluding from consideration the value arising from the 40 trees for which a recovery was barred by subdivision 1, section 339, of the Code of Civil Procedure, as reported in the previous decision above mentioned, which we presume the court fully recognized in determining the element of damage. Harper v. Buckles, 19 Cal.App.2d 481, 65 P.2d 947; Burge v. Albany Nurseries, Inc., 176 Cal. 313, 318, 168 P. 343.

The remaining point involved pertains to the liability of these particular appellants. Originally the action was filed naming as defendants Jesse Lee Watson (Jr.), Jesse Lee Watson (Sr.), appellant herein, Joseph Walter Watson, and Joseph H. Watson, appellant herein. Judgment of nonsuit was granted at the former trial as to defendants Jesse Lee Watson (Jr.) and Joseph Walter Watson. No appeal was taken from this order as to these named defendants.

The facts seem to be that for a good many years the two appellants had been together engaged in citrus growing in various parts of the state; that they had originally conducted their business as partners and about 1927 had incorporated, they being the only substantial stockholders in the corporation; that this corporation continued in existence and continued for the most part to handle their affairs until some time in 1937, when appellant dissolved it and resumed the earlier method of conducting their business. The particular ranch in Vista where the two other defendants were operating, seems to have been purchased by the corporation, but not in the corporation's name. Apparently the funds from their general corporate business were used in its acquisition and it seems that Joseph H. Watson designed, so far as his share in the purchase of this particular property was concerned, to use it for the purpose of getting his son Joseph Walter Watson, started in business, so that apparently with that purpose and intent in mind, the title was taken as to a one-half interest, in Jesse Lee Watson (Sr.), and as to the other one-half interest, in Joseph Walter Watson, although the actual funds that went into the property were those which, through the corporation, accrued to Jesse Lee Watson (Sr.) and Joseph H. Watson respectively, in equal shares and of which Joseph H. Watson gave his son, Joseph Walter Watson, the benefits, so far as the vesting of the record title to the property was concerned. The matter ran on in this shape for a number of years after the title had been acquired. Joseph Walter Watson operated the premises as well as other premises in San Diego county, and conducted a vegetable business on them. He was, apparently, advanced rather considerable sums of money by the corporation in which his uncle and father were interested, as already recited. The conduct of the business, however, by Joseph Walter Watson, was not successful and he became involved in financial difficulties. In October, 1930, he quitclaimed the Vista ranch to his uncle, Jesse Lee Watson (Sr.), without any reservation of growing crops or nursery stock. On May 21, 1931, a date subsequent to the purchase of the nursery stock by respondent Sweet, Jesse Lee Watson (Sr.) turned over that interest in the land quitclaimed to him by Joseph Walter Watson to Joseph H. Watson, thus bringing the title to the land into the two appellants, two brothers, in undivided interests. Joseph Walter Watson apparently, after the quitclaim deed had been made by him in the fall of 1930, continued to manage the premises until January of 1931, when Jesse Lee Watson (Sr.), who it seems was the more active one of the brothers in the management of the affairs generally, sent down to San Diego county Jesse Lee Watson (Jr.), his nephew, who is the other son of Joseph H. Watson, to take charge of the operation of the ranch. Jesse Lee Watson (Jr.) was thereafter paid a salary which seems to have come out of the corporate funds. The nursery stock had all been placed on the Vista ranch during the time that Joseph Walter Watson was actually operating the ranch and during the time that he held in his name the legal title to a one-half interest in it.

It is claimed by appellants, however, that as to the particular row of nursery stock from which the respondent acquired the specific trees complained of, Joseph Walter Watson had retained the title to the stock, notwithstanding his quitclaim of the land. It is claimed that as to certain other rows this was not the case, for it was contended that part of row A of the nursery stock belonged to the two appellants.

According to the respondent's testimony, his purchase of the nursery stock complained of was made chiefly through Jesse Lee Watson (Jr.), although there was more or less conference with Joseph Walter Watson in connection with it. His account is that Jesse Lee Watson (Jr.) insisted on taking time to refer to his uncle and his father (appellants herein) the proposed terms of purchase, which were not entirely for cash, but included the turning over of a note. Respondent testified that these arrangements, according to what Jesse Lee Watson (Jr.) said to him, had to be taken up between Jesse Lee Watson (Jr.) and his uncle and his father (appellants herein) before he could close the transaction, and that time was allowed for this purpose. The defense substantially is that the appellants had no actual connection with the situation at all; that the nursery stock was the property of Joseph Walter Watson and sold by him, and that if there was any remedy, the remedy was against him.

The trial court found that the appellants were the owners of and had title to the nursery stock sold to the respondent. The record title to the real estate on which the nursery stock was growing stood, on the date of the sale to respondent, in the name of the appellant Jesse Lee Watson (Sr.). The appellant Joseph H. Watson, apparently, had an interest in the real estate on which the nursery stock was growing at the time of the sale to the respondent. Part of the nursery stock sold to the respondent admittedly belonged to appellants. A Mr. Shaver, who purchased trees from the Watson ranch in Vista prior to the sale to respondent herein, dealt with the appellant Joseph H. Watson of Downey, California, in seeking a settlement of a similar claim for a breach of warranty.

The consideration paid by respondent for the nursery stock was paid to and received by appellants herein. The evidence shows that the appellants paid for the labor, for the care of the nursery stock sold to respondent, and also for the balling and delivering of the nursery stock to respondent Sweet.

[2, 3] The trial court found that Jesse Lee Watson (Jr.), of Vista, was the agent of the appellants and acted at all times within the scope of his authority, and such finding is supported by the evidence. The trial court further found that J. H. and J. L. Watson, Inc., a corporation, was the alter ego of the appellants, and such finding is also supported by the evidence. The appellants, as partners, were the only two stockholders, in fact, in the corporation. The stockholders or directors of the corporation held no meetings for approximately four years from November 24, 1928, to July 20, 1932. All personal business of the appellants was transacted through the bank account of the corporation. The book of account introduced by appellants showed that from March, 1931, to June, 1932, the appellants designated themselves as partners.

[4] The rule is clear that where a corporation is merely the business conduit of an individual or partners, the courts will look through the corporation to the individual. Wenban Estate Inc. v. Hewlett, 193 Cal. 675, 695, 227 P. 723; Continental Securities etc. Co. v. Rawson, 208 Cal. 228, 238, 280 P. 954. When a corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates in business, the same rule has been held to apply, and whether the corporation be deemed a "one-man" corporation, or as here claimed, a "two-man" corporation, the rule is the same. D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, at page 420, 6 P.2d 251, 79 A.L.R. 329; Wise Realty Co. v. Stewart, 169 Cal. 176, 146 P. 534.

[5] It is well settled that agency may be established by circumstantial evidence. Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 688, 46 P. 738.

[6-8] Appellants base their defense mainly upon the ground that although Joseph Walter Watson conveyed the realty on which the nursery stock was growing to the appellants, that by some oral reservation he, Joseph Walter Watson, continued to have the title to the nursery stock on the "C" line in the orchard, from which line he claims he sold the trees to respondent. It is a general rule that in order for a vendor to reserve the growing crops when the realty is conveyed, there must be a written reservation, and in the absence of such a written reservation, the growing crops pass with the realty. Wilson v. White, 161 Cal. 453, 460, 119 P. 895. The findings of the trial court that the appellants were in fact the owners of the nursery stock, that the nursery stock was sold by their agent, and that their agent acted within the scope of his authority, being supported by the evidence, are not subject to attack merely because there is evidence in the record which is conflicting with the evidence supporting the findings. Carter v. Carr, 139 Cal.App. 15, 33 P.2d 852; Paff v. Ottinger, 32 Cal.App. 439, 441, 163 P. 230; Hope Mining Co. v. Burger, 37 Cal.App. 239, 244, 174 P. 932; Interstate Grocer Co. v. George William Bentley Co., 214 Mass. 227, 101 N.E. 147. We are of the opinion that the findings of the trial court are sufficiently supported by the evidence.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

35 Cal.App.2d Supp. 743

## PEOPLE v. STEEL.

No. 96312.

Appellate Department, Superior Court, San Diego County, California.

June 19, 1939.

**1. Automobiles** 🔑330

Under statute providing that one who drives in such manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving, it is from all circumstances concerning method of driving that a court or jury is called on to decide whether the statute has been violated, and it is not meant that the evidence be submitted to anyone other than the court. Vehicle Code, § 505, St.1935, p. 175.

**2. Statutes ⚷181(2), 206**

A statute should be so construed as to give a sensible and intelligent meaning to every part, and so as to make every provision thereof effective.

**3. Statutes ⚷183**

The mere literal construction of a word in a statute should not prevail if it is opposed to the Legislature's intention, apparent by the statute, and, if the word is sufficiently flexible to admit of some other construction, it should be adopted to effectuate the intention.

**4. Statutes ⚷183**

The intent of a statute prevails over the letter, and the letter will if possible be so read as to conform to the spirit of the statute.

**5. Constitutional law ⚷48**

The court is justified in the public interest in adopting the construction of a statute which favors its constitutionality though it is susceptible to either of two constructions.

**6. Indictment and Information ⚷110(3)**

An offense created by statute may be charged in the language of the statute, without alleging evidentiary facts. Pen.Code, § 1426.

**7. Indictment and Information ⚷110(3)**

If a statute is sufficient in itself to define an offense, a complaint charging a public offense in the language of the statute is sufficient. Pen.Code, § 1426.

**8. Automobiles ⚷330**

The word "indicate," within statute providing that one who drives in such manner as to "indicate" either willful or wanton disregard of the safety of persons or property is guilty of "reckless driving," does not refer to what a bystander may think of the manner of driving, but refers to what the court or jury may think, and, if evidence adduced at trial indicates to the court or jury beyond reasonable doubt that a defendant has a willful or wanton disregard for the safety of persons or property, such defendant is guilty of violating the statute. Vehicle Code, § 505, St.1935, p. 175.

The word "indicate" means to point out, or to direct to a knowledge of; as to indicate the way; to be an index, sign, or token of; to betoken, as the height of the mercury in the thermometer indicates the temperature; to state or sketch briefly; to intimate or show indirectly in the course of a statement, discussion, or the like, as there is time only to indicate the method to be pursued. In medicine "indicate" means to show or manifest by symptoms; to point to as the proper remedies; as, great prostration of strength indicates the use of stimulants. In machinery it means to take an indicator diagram, or set of diagrams from (an engine) by means of an indicator or indicators; to test by means of the indicator. The synonyms of "indicate" are show, mark, signify, denote, discover, evidence, evince, manifest, declare, specify, explain, exhibit, present, reveal, disclose, display.

[Ed. Note.—For other definitions of "Indicate" and "Reckless Driving," see Words & Phrases.]

**9. Automobiles ⚷316**

The statute providing that one who drives in such manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving, is constitutional. Vehicle Code, § 505, St.1935, p. 175.

* * *

Appeal from Municipal Court of San Diego; DANEY, SMITH, SHELL, SHERRY, and TERRY, Judges.

Charles Louis Steel was charged with violating a provision of the Vehicle Code. The charge was dismissed on his motion prior to trial, and the People appeal.

Reversed.

James B. Abbey, Dist. Atty., by Duane Carnes, Deputy Dist. Atty., and Dayton Ault, City Atty., by William Macomber, Deputy City Atty., all of San Diego, for the People.

Wright, Monroe, Harden & Thomas, by John W. McInnis, all of San Diego, for appellee.

GORDON THOMPSON, Judge pro tem.

Defendant was charged in a criminal complaint with a violation of Section 505 (b) of the Vehicle Code; the second count of the complaint charged a violation of Section 560(b) of the Vehicle Code which was dismissed by the People in furtherance of justice prior to trial. The first count (violation of Section 505(b) was dismissed on motion of Defendant prior to trial; the ground specified in the motion was that said section was unconstitutional. In granting the motion for dismissal the trial court relied on a written decision rendered by the Municipal Court of the City of San Diego En Banc on the 20th day of April, 1939. The sole question presented by this appeal is the constitutionality of Section 505(b) of the Vehicle Code of the State of California, which, in part, provides as follows: "Any person who drives any vehicle upon a highway in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property, is guilty of reckless driving * * *." By its decision the Municipal Court reviewed the legislative history of the statute here under consideration. We hardly find this necessary in that the question to be decided is as to the wording of the now existing statute.

The main contention is as to the definition of the word "indicate" and its applicability to the section. We find in Webster's New International Dictionary, 1933 Edition:

"*Indicate.* (L. *indicatus,* p.p. of *indicare,* to indicate; In-in + Dicare to proclaim; akin to dicere to say. See *Diction;* cf. *Indict, indite.)*

"1. To point out or to; to direct to a knowledge of; as, to *indicate* the way; to be an index, sign, or token of; to betoken, as the height of the mercury in the thermometer *indicates* the temperature.

"2. To state or sketch briefly; to intimate or show indirectly in the course of a statement, discussion or the like, as there is time only to *indicate* the method to be pursued.

"3. Med. To show or manifest by symptoms; to point to as the proper remedies; as, great prostration of strength *indicates* the use of stimulants.

"4. Mach. To take an indicator diagram, or set of diagrams from (an engine) by means of an indicator or indicators; to test by means of the indicator.

"Syn.—Show, mark, signify, denote, discover, evidence, evince, manifest, declare, specify, explain, exhibit, present, reveal, disclose, display."

[1-5] Respondent contends, by the adoption of the opinion of the Municipal Court of San Diego sitting En Banc, "that the offense, then, is to *indicate* a certain manner of driving, (to some undisclosed person or persons.)" With this contention we cannot agree. It is from all of the facts and circumstances concerning the manner and method of driving that a court or jury is called upon to decide whether the statute has been violated. It is not meant that this evidence be submitted to anyone other than the court. A statute "should always be so construed as to give a sensible and intelligent meaning to every part * * * so as to make every provision thereof valid and effective." In re Haines, 195 Cal. 605, 234 P. 883, 885. The mere literal construction of a word in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute, and if the word is sufficiently flexible to admit of some other construction, it is to be adopted to effectuate the intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. The court is justified in the public interest, in adopting the construction of a statute which favors its constitutionality even if susceptible to either of two constructions.

[6, 7] It is well settled law in this State that in charging a criminal offense created by statute, the offense may be charged in the language of the statute, and that this is sufficient pleading; evidentiary facts need not be alleged. People v. Green, 65 Cal.App. 234, 223 P. 1004; People v. Maguire, 26 Cal. 635; Penal Code, § 1426. Therefore, if the statute is sufficient in itself to define an offense, a complaint charging a public offense in the language of the statute is sufficient.

[8, 9] Section 505 of the Vehicle Code makes it unlawful for one to operate a vehicle with a wilful disregard for the rights of human beings, and that the State in the introduction of evidence need only to show to the court or jury evidence from which the court or jury can find beyond a reasonable doubt that a defendant had such disregard. The word "indicate" in the statute does not mean what a bystander may think of the manner in which a defendant drives, but the indication goes clearly to what the court or jury may think and the conclusion therefrom. If the evidence adduced at a trial "indicates"

to the court or jury beyond a reasonable doubt that a defendant has "a wilful or wanton disregard for the safety of persons or property," then it is obvious that such defendant is guilty of a violation of Section 505, Subdivisions (a) and (b) of the Vehicle Code of the State of California.

From the foregoing we are of the opinion that the statute here under consideration is constitutional and not void. The Order and Judgment appealed from is reversed.

We concur: TURRENTINE, Acting P. J.; MUNDO, J.

14 Cal.2d 82

## Ex parte PETERSON.

Cr. 4217.

Supreme Court of California.

July 25, 1939.

**1. Habeas corpus 🔑1**

Ordinarily, the purpose of a "writ of habeas corpus" is to procure one's discharge from custody alleged to be illegal.

[Ed. Note.—For other definitions of "Writ of Habeas Corpus," see Words & Phrases.]

**2. Habeas corpus 🔑1**

An extraordinary writ of habeas corpus may be used by a convicted prisoner to compel the execution of his sentence.

**3. Pardon 🔑14**

Consent by the prisoner is a prerequisite to the validity of a conditional pardon, since terms of pardon may be more objectionable than the punishment fixed by the sentence.

**4. Pardon 🔑14**

As used in penology, "parole" signifies the release of a prisoner prior to the expiration of his term of imprisonment conditioned upon his continuing good behavior during remainder of term.

[Ed. Note.—For other definitions of "Parole," see Words & Phrases.]

**5. Pardon 🔑14**

In its essential characteristics, a "parole" cannot be distinguished from a "conditional pardon," and each constitutes the release of a convict upon fixed conditions before the expiration of his term of imprisonment.

[Ed. Note.—For other definitions of "Conditional Pardon," see Words & Phrases.]

**6. Pardon 🔑14**

Under statute defining rights and duties of the board of prison terms and paroles with respect to the parole of prisoners, the board is not authorized to require a prisoner to accept a parole ordered by it, and the consent of a prisoner is a prerequisite to his release upon parole. Pen.Code, § 1168.

**7. Pardon 🔑14**

A prisoner could not convert a parole order of the board of prison terms and paroles into an unconditional parole merely by rejecting the condition attached to such order, and, in rejecting the order of parole, the prisoner thereby rendered himself bound to serve unexpired term of his sentence as fixed or subsequently modified. Pen.Code, § 1168.

**8. Pardon 🔑14**

Where petitioner for habeas corpus had escaped from prison in Texas before his term of sentence had expired and was subsequently convicted of an offense in California, and California board of prison terms and paroles had provided that the last two years of petitioner's sentence were to be on parole to custody of Texas authorities, and, when petitioner was eligible for parole, an agent of Texas served a warrant of extradition upon him, petitioner, by rejecting parole, was entitled to be discharged from custody by virtue of warrant of extradition but was bound to serve unexpired term of sentence as fixed or subsequently modified by California authorities. Pen.Code, § 1168.

SHENK, J., dissenting.

---

In Bank.

Proceeding in the matter of the application of Carl Peterson for a writ of habeas corpus, wherein Carl Peterson demands the right to reject a parole granted to him by the board of prison terms and paroles under the indeterminate sentence law, Penal Code, section 1168.

Petitioner ordered discharged from custody by virtue of a warrant of extradition and remanded to custody of warden.

Jerome L. Schiller, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and A. E. Bagshaw, Dist. Atty., of San Francisco, for respondent.

EDMONDS, Justice.

[1, 2] Ordinarily, the purpose of a writ of habeas corpus is to procure one's discharge from custody alleged to be illegal. In the present case, the petitioner, an inmate of the state prison at San Quentin, is demanding the right to reject a parole granted to him by the board of prison terms and paroles under the indeterminate sentence law. Section 1168, Pen.Code. Although petitioner claims the further right to an absolute discharge from custody, logically, his primary contention would require an order remanding him to the custody of the warden for the remainder of

the sentence originally imposed upon him. That an extraordinary writ may be used by a convicted prisoner to compel the execution of his sentence was decided in In re Collins, 8 Cal.App. 367, 97 P. 188.

The petitioner's unusual position is occasioned by the fact that before his difficulties in this state he was convicted of a felony in Texas for which he was sentenced to a term of 30 years. Later he escaped from the Texas prison to which he was committed and came to California where, in 1935, he was charged with the crime of burglary in the second degree after having been previously convicted of a felony. The state of Texas having waived extradition, he was tried, convicted, and sentenced to the state prison for the term prescribed by law. Section 1168, Pen.Code.

In due time the board of prison terms and paroles fixed his term of imprisonment at 7½ years, the last two years of which were to be on parole "to the custody of the Texas authorities". When he was eligible for parole, but still in custody at San Quentin prison, an agent of the state of Texas served a warrant of extradition, issued by the governor of California, upon him. The return of the warden to the writ of habeas corpus by which it is sought to stay the execution of that warrant, states that unless otherwise ordered, by this court, he will deliver the petitioner to the agent of the state of Texas as directed by the governor.

The principal point urged by the petitioner challenges the right of the board of prison terms and paroles to terminate his imprisonment under parole conditions not accepted by him. He argues that as a parole is not a termination of the sentence imposed, but a continuance of that sentence under particular conditions fixed by the board and required to be fulfilled by the convict, it is only effective when accepted and cannot be forced upon him without his consent. In support of this contention, he relies by analogy upon pertinent rules which have been established in regard to executive pardons.

[3] It has long been held that consent by the prisoner is a prerequisite to the validity of a conditional pardon because its terms may be more objectionable than the punishment fixed by the sentence. United States v. Wilson, 7 Pet. 150, 8 L.Ed. 640; and see cases cited in Annotation 52 A.L.R. 835. The same conclusion has been reached in California. Many years ago this court held that to be effectual, a conditional pardon must be accepted by the prisoner. Ex parte Marks, 64 Cal. 29, 28 P. 109, 49 Am.Rep. 684.

[4-6] The word "parole" was originally a military term signifying the word of honor or promise of a prisoner of war that if he be released, he will comply with certain conditions, such as to refrain from bearing arms against his captors. As used in penology, the term has come to signify the release of a prisoner prior to expiration of his term of imprisonment conditioned upon his continuing good behavior during the remainder of the term. In its essential characteristics, therefore, a parole cannot be distinguished from a conditional pardon. Each constitutes the release of a convict upon fixed conditions before the expiration of his term of imprisonment and many courts have drawn upon this analogy to hold that a proffered parole must likewise be accepted to be effective. Ex parte Hawkins, 10 Okl.Cr. 396, 136 P. 991; Ex parte Taggert, 12 Okl.Cr. 439, 158 P. 288; Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L.R.A. 502, 82 Am.St.Rep. 17; Re Patterson, 94 Kan. 439, 146 P. 1009, L.R.A.1915F, 541; Ex parte Colcord, 49 S.D. 416, 207 N.W. 213; State v. Goddard, 69 Or. 73, 133 P. 90, 138 P. 243, Ann.Cas.1916A, 146. Section 1168 of the Penal Code, which defines the rights and duties of the board, and empowers it to parole prisoners upon such conditions as it may deem proper, does not authorize the board to require the prisoner to accept a parole ordered by it, and under the principles stated and applied in the authorities cited, the consent of the petitioner is a prerequisite to his release upon parole.

[7, 8] However, this conclusion does not entitle petitioner to an absolute discharge from custody at this time, for he cannot convert the board's order into an unconditional parole merely by rejecting the condition attached. In rejecting the order of parole, he renders himself bound to serve the unexpired term of his sentence as now fixed or subsequently modified. It is, therefore, ordered that petitioner be discharged from custody by virtue of the warrant of extradition and remanded to the custody of the respondent warden.

We concur: HOUSER, J.; LANGDON, J.; CURTIS, J.

SHENK, Justice (dissenting).

I dissent.

As a part of his return herein, the warden of San Quentin prison has filed the original warrant of extradition signed by the governor of this state on January 17, 1939, and directing that the petitioner be delivered to the Texas authorities.

It is settled that the exercise of the executive discretion to issue the extradition warrant may be inquired into in habeas corpus proceedings. Hyatt v. People, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657; 12 Cal.Jur., p. 406. But it has been held many times that the prisoner may not be deemed to have a voice in the matter of his extradition. Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; People v. Hagan, 34 Misc. 85, 69 N.Y.S. 475; People v. Klinger, 319 Ill. 275, 149 N.E. 799, 42 A.L.R. 581; note, 42 A.L.R. 585; State v. Saunders, 288 Mo. 640, 232 S.W. 973. See, also, Carpenter v. Lord, 88 Or. 128, 171 P. 577, L.R.A.1918D, 674, at page 680, and note. Consequently, there would seem to be no necessity in this case to invoke the inverse function of the writ of habeas corpus to investigate the question whether the petitioner may exercise his preference to remain in San Quentin prison.

The duty to extradite a fugitive from justice upon a legal requisition from a sister state is imposed by article IV, section 2, of the United States Constitution, U.S.C.A. Taylor v. Taintor, 16 Wall. 366, 83 U.S. 366, 21 L.Ed. 287; State v. Hall, 40 Kan. 338, 19 P. 918, 10 Am.St.Rep. 200, and cases cited. The leading case of Taylor v. Taintor, supra, is to the effect that the duty is not, however, absolute, and that the laws of the asylum state may first be satisfied for any infraction of its penal provisions. The legislature of this state in 1937 (Stats.1937, p. 1581), in adopting the Uniform Criminal Extradition Act, added section 1553.1 to the Penal Code providing that if a criminal prosecution has been instituted against the fugitive under the laws of this state and is still pending, the governor, with the consent of the attorney-general, may surrend him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and served his sentence in this state. The governor has duly issued the extradition warrant and the attorney-general is demanding in this proceeding that the order be carried out.

The foregoing cited cases tend to establish that the present weight of authority is to the effect that when the governor has duly exercised the discretion so vested in him by statute, there is no question remaining for judicial investigation in a habeas corpus proceeding. They seem to leave little to be said to resolve the question adversely to the petitioner's contentions when it is considered that the executive authorities have determined that the demands of this state on account of the prisoner's infractions of its penal laws have been fully satisfied.

In my opinion the prisoner should be remanded subject to the warrant of extradition.

14 Cal.2d 113

## SULLIVAN v. McKINLEY et al.

S. F. 16248.

Supreme Court of California.

July 31, 1939.

**1. Municipal corporations 🔑111(1)**

No ordinance is valid unless and until the mandatory prerequisites to its enactment and performance are substantially observed.

**2. Municipal corporations 🔑885**

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, time for establishing an increase in wage rate of municipal employees is before passage of annual salary ordinance.

**3. Municipal corporations 🔑885**

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, once budget is approved by board of supervisors, the fiscal terms of annual appropriation ordinance and annual salary ordinance are automatically fixed beyond power of change by any amendment.

**4. Municipal corporations 🔑885**

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, any effort of board of supervisors to increase the wage scale in annual salary ordinance over amount provided in approved budget is void.

**5. Municipal corporations ⚷885**

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, and approved budget provided for $9 a day to auto and car painters of Municipal Railway Department, $1 per day increase in wage rate to such painters provided in annual salary ordinance was ineffective, notwithstanding appropriation made available to Municipal Railway Department was sufficient to pay increased wages.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Petition for writ of mandate by Edward Sullivan against Howard M. McKinley and others as members of and constituting the Civil Service Commission of the City and County of San Francisco and another. From an adverse judgment, defendants appeal.

Judgment reversed.

For prior opinion, see 89 P.2d 125.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Allen G. Wright and Wright & Wright & Larson, all of San Francisco, amici curiae on behalf of San Francisco Chamber of Commerce, San Francisco Real Estate Board, Building Owners and Managers Ass'n.

John J. Dailey, of San Francisco, for respondent.

PER CURIAM.

This court, recognizing the importance this case might have upon the budgetary and fiscal procedure of the city and county of San Francisco under its charter provisions, took over the cause for further consideration, and now, after reargument, we are satisfied to adopt the opinion of the late Mr. Presiding Justice Tyler as follows:

"Petition for writ of mandate on behalf of certain auto and car painters of the Municipal Railway Department. After issue joined, a trial was had which resulted in a judgment directing the issuance of a peremptory writ of mandate against the defendants granting the demands of petitioner. From the ruling in the court below, this appeal is prosecuted. The record reveals the following facts:

"Petitioner, together with eight other individuals, is employed as an auto and car painter in the Municipal Railway Department, which is a division of the Public Utilities Commission of the city and county of San Francisco. During the fiscal year 1936-37, the wage of petitioner and his eight coworkers as auto and car painters in said department was fixed and established at $9 per day. Pursuing the steps necessary to provide the funds needed to carry on the various functions under the control of the Public Utilities Commission for the fiscal year 1937-38, that body prepared budget estimates for the different utilities under its jurisdiction, one of which was that of the Municipal Railway. The budget estimate recommended by the Public Utilities Commission for the class of car and auto painters carried the rate of $9 per day, and the estimated amount necessary to pay for such number of employees at the indicated rate was $22,599. This budget estimate originating with the Public Utilities Commission was joined with the budget estimates coming from other departments and offices of the city government by the Controller, and formed the consolidated budget estimate of all municipal divisions for transmission to the Mayor. The Mayor then gave consideration to the consolidated budget estimate, in which was that of the Municipal Railway. When he came to the item of 'car and auto painter', he accepted the recommendation concerning the number of employees, their daily rate of wage, and the amount necessary to be appropriated in order to satisfy the same, as theretofore set forth by the Public Utilities Commission, and ordered his recommendation to be entered in the proper sheet. The Mayor, after completion of the numerous budget estimates as contained in the consolidated budget estimate, transmitted his recommendations thereon to the Board of Supervisors for its consideration and action. With the consolidated budget, as recommended by the Mayor, went a proposed appropriation ordinance to the said Board of Supervisors. The legislative division then reviewed the recommendations of the Public Utilities Commission and the Mayor. This resulted in the board adopting the figures set out by the Commission and the Mayor in reference to car and auto-painters. On Monday, May 24, 1937, the budget for the fiscal year 1937-38 was adopted by the Board of Supervisors. Shortly thereafter, to-wit, on June 2, 1937, the annual appropriation ordinance for the fiscal year 1937-38 was adopted by the Board of Supervisors and approved by the Mayor.

"Under date of June 15, 1937, E. G. Cahill, the manager of utilities, Public Utilities Commission, addressed a letter to the Mayor requesting that the daily rate of wage of car and auto painters be fixed at $10 instead of $9 a day. The Mayor and the Board of Supervisors in the annual salary ordinance 1937-38, which was adopted on the 28th day of June, 1937, provided for nine car and auto painters, Municipal Railway, at $10 per day instead of the $9 rate theretofore established in the budget and appropriation ordinance. The question to be determined is whether the Board of Supervisors and the Mayor, in fixing in the annual salary ordinance a rate of wage for auto and car painters different from that in the budget estimate of the employing department, and in the recommendation of the Mayor, and in the budget of said Board and Mayor, violate the terms of the organic law. The trial court found that the adoption of the budget estimate of expenditures for the year 1937-38, incorporating the wage rate to be paid petitioner and his associates did not control, and they recovered the amount contained in the salary ordinance.

"Two questions are raised on the appeal. The first concerns the admissibility into evidence of the letter dated June 15, 1937, whereby E. J. Cahill requested a change in the rate of pay of petitioner and his coworkers, it being the claim of appellants that there were no provisions under the charter permitting Mr. Cahill to send the communication; the second, that the legal effect of the evidence adduced before the trial court does not justify its findings.

"The city and county of San Francisco as a municipal corporation operates under a freeholders' charter. Section 69 of said instrument reads as follows: '* * * The budget estimate for every department and office of the city and county, whether under an elective or an appointive officer or a board or commission, and separately for each utility under the control of the Public Utilities Commission, shall be filed by the executive of such department with, and shall be acted upon by, such board or commission. All budget estimates shall be compiled in such detail as shall be required on uniform blanks furnished by the controller. The Public Utilities Commission and the board of education must hold public hearings on their respective budget proposals. Each such elective and appointive officer, board or commission shall, not later than the 15th day of February of each year, file with the controller for check as to form and completeness two copies of the budget estimate as approved * * *.'

"Section 70 of the charter, among other things, provides: '(4) A schedule of positions and compensations showing any increases or decreases requested in the number of positions or rates of pay.'

[1] "The budget estimate for the fiscal year 1937-38 for the Municipal Railway did not show any increase in the rate of pay for the position of car and auto painter. The evidence shows without conflict that the budget estimate for the Municipal Railway, as prepared in conformity with the terms of section 70 of the Charter and as approved by the Public Utilities Commission for submission to the Mayor, stated the amount to be paid was $9 a day out of a fund of $22,599. No ordinance is valid unless and until the mandatory prerequisites to its enactment and performance are substantially observed. The evidence adduced before the trial court shows a failure of the responsible authorities to do the things essential within the time prescribed by the basic municipal law for the creation of an increase in wages, and establishes without conflict a wage rate of only $9 a day for the indicated positions.

"Section 71 of the Charter provides: 'All increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, and no such increase shall be effective prior to the fiscal year for which the budget is adopted. * * *'

[2-5] "The time for establishing an increase in wage rate of municipal employees, such as the petitioner and his

eight companions, is before the passage of the annual salary ordinance. And the instruments within which the increase of the rate of wage is to be expressed are (1) annual budget estimates, (2) annual budget, and (3) appropriation ordinance. Once the budget is approved by the Board of Supervisors, the fiscal terms of the annual appropriation ordinance and the annual salary ordinance are automatically fixed beyond the power of change by any amendment. Any effort of the Board of Supervisors to increase a wage scale in the annual salary ordinance over the amount provided in the approved budget is void. The Mayor must submit his proposed budget to the Board of Supervisors each year not later than the 1st day in May. (Charter, sec. 72.) After public hearing and not earlier than the 15th day of May, nor later than the 1st day of June, the Board shall adopt the proposed budget as submitted or as amended, and shall pass the necessary appropriation ordinance. If in that period the Mayor should request the Board to increase any salary or wage schedule, the Board could provide for such increase by amending the proposed budget accordingly, provided the Mayor's request was made on the proper recommendation of the department or office concerned. But each increase though so requested could not be made in the annual salary ordinance unless previously made in the proposed budget, for the reason that the annual salary ordinance is limited by the provisions of the approved budget.

"It must be remembered that the budget found on the estimates submitted by the Public Utilities Commission, approved and recommended by the Mayor, and adopted by the Board of Supervisors, was finally approved on May 24, 1937; that the appropriation ordinance providing the funds to meet the items in the aforesaid budget was adopted by the Board of Supervisors on June 1, 1937, and approved by the Mayor on the 2d day of June, 1937; that these instruments, together with the estimates furnished by the commission did in no instance provide a daily wage rate of $10 for the petitioner and his associates, but did on the contrary provide a rate of $9 a day. It must also be remembered that the annual salary ordinance which carried the wage rate of $10 a day for the interested persons was passed twenty-six days later, on June 28, 1937, and represented an increase in wage rate of $1 a day, together with shorter hours. From what we have said it is obvious that the payment of an increase in the wage rate of petitioner and the other car and auto painters is a direct and positive disregard of the terms of section 71 of the charter.

"Our conclusion renders unnecessary a disposition of the question of the authority of Mr. Cahill to send to the Mayor his request for the increase in pay. Respondent claims that the increase in the wage rate of himself and his associates did not necessitate an increased appropriation. The fact remains, however, that it is an increase in rate of wage in a manner not authorized by the city charter, and the mere fact that the appropriation made available to the Municipal Railway Department was sufficient to pay the wages of petitioner and his associates is unimportant."

To the foregoing it might be added that, under the charter, salaries and wages are not fixed by the salary ordinance alone. The principal purpose of that document seems to be to bring the salaries and wages as finally determined into one ordinance for more convenient reference.

Section 71 of the charter provides that "all increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances * * *." These ordinances must be adopted not later than June 1 of each year.

It is significant that here the annual budget estimates as submitted by the Mayor fixed the wage scale for auto and car painters at $9 a day, and no change in that amount was indicated in the appropriation ordinance. On June 1, in accordance with the charter, the Board, without amendment and after public hearing, adopted the budget and passed the appropriation ordinance. On June 14 the annual salary ordinance was passed to second reading and then provided for $9 as the wage scale of car and auto painters. On June 15 a request was filed by Mr. E. G. Cahill, Manager of Public Utilities, approved by the Mayor, requesting that the daily rate of wages of the car and auto painters be fixed at $10 instead of $9. On June 28 the salary ordinance was adopted and for the first time the rate of $10, rather than $9, per day for these employees was accepted.

The wage scale of these car and auto painters had not been fixed at the rate of $10 per day "by the budget and annual salary ordinance", as required by section 71, and clearly, from this language, the salary ordinance must find its support in the items of the budget.

The judgment directing the issuance of a peremptory writ of mandate is reversed.

14 Cal.2d 68

## BYINGTON et al. v. SUPERIOR COURT OF STANISLAUS COUNTY et al.

S. F. 16169.

Supreme Court of California.

July 22, 1939.

**1. Appeal and error** 🔑460(2)

A prohibitory injunction is not stayed by appeal therefrom, but mandatory injunction is automatically stayed by appeal.

**2. Waters and water courses** 🔑152(12)

An injunction against storage of water by city in excess of amount which it had prescriptive right to store was "affirmative or mandatory injunction" so far as it precluded exercise of city's appropriative rights to excess waters of river, and hence was automatically stayed by appeal from decree granting it, so that city, members of its public utilities commission, and manager of its utilities were not guilty of contempt in converting and storing such excess waters.

[Ed. Note.—For other definitions of "Mandatory Injunction," see Words & Phrases.]

In Bank.

Proceeding by Lewis F. Byington and others, as members of and constituting the Public Utilities Commission of the City and County of San Francisco, and another, to review and annul an order of the Superior Court of the County of Stanislaus and Raglan Tuttle, Judge presiding therein, adjudging petitioners guilty of contempt in violating an injunction and imposing punishment therefor.

Order annulled.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and A. E. Chandler, Sp. Counsel, all of San Francisco, for petitioners.

M. C. Sloss, of San Francisco, for respondent Superior Court of Stanislaus County.

PER CURIAM.

The petitioners Byington, Filmer, McCallum, McLaughlin and Murphy, as members of and constituting the public utilities commission of the city and county of San Francisco, and the petitioner Cahill, as the manager of utilities of said city and county, seek by this proceeding to review and annul an order of the respondent superior court adjudging them guilty of contempt and directing that each pay a fine of $100 or in lieu thereof to serve one day in jail for each $5 of the fine remaining unpaid. The alleged contempt consisted of the violation of an injunction entered by the respondent court, the execution of which, petitioners claim, had been stayed by an appeal.

The action in which the injunction had issued was commenced on May 31, 1932, by Meridian, Ltd., a corporation, against the city and county of San Francisco and four other defendants. It was in the nature of an action to quiet title to water rights and for injunctive relief to protect those rights. As between the plaintiff and the city the action involved the rights of the city as an appropriator of water of the Tuolumne river in connection with its Hetch Hetchy project, and the rights of the plaintiff as a riparian owner and appropriator of water down stream from the works of the city. At the conclusion of a protracted trial the respondent superior court on June 18, 1936, decreed to the defendant city, as superior to the plaintiff's riparian right, a prescriptive right to store 235,465 acre feet of water per seasonal year and enjoin it from storing water in excess of such amount, which amount represented the then capacity of the city's two reservoirs. Both parties appealed.

It appears that during the progress of the trial, the city had started work on increasing the height of its Hetch Hetchy dam to provide holdover storage in that reservoir for its Moccasin power plant. The work was completed in April, 1938, subsequent to the entry of judgment and while the cause was on appeal. The capacity of the dam was thereby increased from 206,000 to 340,830 acre feet. The enlarged reservoir was filled during the period May 12 to 30, 1938, pending the appeal. Upon the filing of an affidavit by plaintiff's counsel, the trial court cited the petitioners to show cause, if any they had, why they should not be adjudged in contempt for storing in the enlarged reservoir a quantity of water in excess of that awarded to the city under its decree. Contrary to the contention of the petitioners herein, the respondent court upon the hearing concluded that the injunction issued by it was wholly prohibitory, and not mandatory, in character and was not therefore stayed by the appeal so as to warrant a storage of water greater than that therein allotted to the city.

[1] It is well settled that a prohibitory injunction is not stayed by an appeal therefrom while an injunction mandatory in character is automatically stayed by appeal. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 637, 7 P.2d 706; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Baar v. Smith, 201 Cal. 87, 255 P. 827. Whether an injunction is prohibitory or mandatory in character is not always easy of determination. What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory. The authorities indicate that an injunctive decree that compels the surrender of the lawful possession of real property amounts to the granting of affirmative relief and is mandatory in character. Clute v. Superior Court, 155 Cal. 15, 18–20, 99 P. 362, 363, 132 Am.St.Rep. 54. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 637, 638, 7 P.2d 706. The Clute case, supra, declares that such a decree, though couched in terms of prohibition, is mandatory in effect, and a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature and is not permissible pending appeal. In that case an injunction issued "restraining the defendant Clute from collecting any moneys of the corporation or disbursing the same except on the written order of the president and secretary, also restraining him from representing himself as manager and treasurer of the corporation and 'from interfering with, or directing, or attempting to direct or control the employes of said corporation'". Clute prosecuted an appeal from the decree, pending which, and in violation of the terms of the decree, he prevented an employee of the corporation from entering the office. He was adjudged in contempt. Upon a review of the contempt proceeding, this court, while recognizing that the injunction was couched in terms of prohibition, nevertheless held it to be affirmative or mandatory in character. It is there declared: "If Clute was in the actual possession of the hotel and the personal property in it, an order punishing him for preventing another person from entering and taking charge of the books, keys, and other property could have no other purpose or effect than to compel him to turn over his possession to such other, or at least to surrender his theretofore exclusive possession. * * * The status of the parties, at the time the injunction was issued, was this: Clute, claiming to hold on behalf of the corporation, was resisting a right of entry claimed by persons who, as he asserted, had no authority from the corporation to take possession. An order turning over the control of the property from him to the other claimants would certainly, if executed, operate to change that status. The injunction was, therefore, mandatory in effect, and this regardless of the fact that, in law, the corporation, rather than Clute, may be said to have been in possession. It is therefore unimportant that the court inserted in its order of commitment a finding that Clute was not in possession of the hotel or its contents. For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory."

Analogous reasoning was employed in the comparatively recent Joerger case, supra [214 Cal. 630, 7 P.2d 707], wherein a temporary injunction had issued restraining the defendants "from continuing to divert any of the waters of Hat creek from the natural channel of said stream, where the same passes through, over, along, by, upon and past" the plaintiff's riparian land. Pending an appeal from such seemingly prohibitory injunctive decree, the defendants sought a supersedeas to stay its operation. The application was denied without prejudice upon the ground that the injunction was mandatory in character and stayed as a matter of law pending the appeal. In so concluding, this court stated: "After further consideration of the question we are persuaded that the injunctive order issued herein has the essential characteristics of a mandatory injunction. The defendants are and always have been lawfully in possession of their property. In that possession they are engaging in a lawful use thereof. They are not trespassing upon any of the rights of the plaintiff. They are not maintaining a nuisance. They are entitled in any event to their proportional share of the water by reason of the fact that their rights and the rights of the plaintiff are correlative, co-ordinate, and in common as to said opposite riparian lands. These rights may be exercised by either party subject to the equitable power of the court to apportion the use of the water as between them. The effect of the order, if enforced, would be to disturb a lawful use of property lawfully in possession, and to dispossess the defendants of the use of any of the waters of the stream. It would thus compel the surrender of the lawful possession of real property, and would amount to affirmative relief as contemplated by the decisions. United Railroads v. Superior Court, 172 Cal. 80, 155 P. 463; Ohaver v. Fenech, 206 Cal. 118, 122, 273 P. 555 [supra]."

[2] In our opinion, the foregoing authorities are decisive of the present proceeding. The reasoning therein compels the conclusion that the injunction involved herein was mandatory in character and stayed by the appeal therefrom. Throughout the trial of the main action, and up to the present moment, the city has contended that in addition to the prescriptive right recognized in and awarded to it under the decree of the respondent court, it was the owner and possessor of certain appropriative rights in and to the waters of the Tuolumne river. The effect of the injunctive decree was to compel the city to restrict its storage solely to the amount of water to which it was entitled under its prescriptive right and to subordinate certain of the city's appropriative claims to that of the plaintiff in the action and, in effect to deprive the city of the full possession and privilege of exercising such appropriative rights. That the appropriative rights consistently asserted by the city were improperly denied to it by the decree of the respondent court, is attested by the fact that this court recently had occasion upon appeal to modify the decree of the respondent court in a manner which recognized and upheld, subject to the plaintiff's riparian right, the city's appropriative rights to an extent warranting diversion and storage by the city to the full capacity of the enlarged reservoir. Meridian Ltd. v. City and County of San Francisco, Cal.Sup., 90 P.2d 537. We are of the view, therefore, that in so far as the injunctive decree of the respondent court undertook to and did preclude the exercise by the city of its appropriative rights in and to the excess waters of the Tuolumne river it was affirmative or mandatory in character, within the meaning of the authorities, and was therefore automatically stayed by the appeal therefrom and the action of the city and petitioners, pending the appeal, in diverting and storing excess waters to the capacity of the enlarged reservoir was not contemptous and the order characterizing and punishing it as such was in excess of the respondent court's power and jurisdiction and must be annulled.

In conclusion, it is well to point out that at the time of the storage which gave rise to this proceeding there was flowing by the lands of the plaintiff corporation in the principal action an amount of water much in excess of its entitlement under the respondent court's decree. In other words, at no time has the city or its agents diverted or stored water in such manner or quantity as to interfere with the taking by the plaintiff riparian owner of its decreed quantity of water.

The order adjudicating petitioners in contempt and imposing punishment therefor is annulled.

## DE GRAF v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

S. F. 16205.

Supreme Court of California.

July 26, 1939.

Rehearing Denied Aug. 24, 1939.

**1. Landlord and tenant 🔑165(6)**

Tenant's business manager who, along with tenants, had been invited by building manager of owners of building to witness parade at night from building, but who decided to witness parade from sidewalk in front of building, and who used freight elevator to transport some chairs for himself and his guests, was not, as respects liability of owners of building for injuries sustained by him in fall down open elevator shaft, a "licensee."

[Ed. Note.—For other definitions of "Licensee," see Words & Phrases.]

**2. Landlord and tenant 🔑162**

Owners of building were required to use ordinary care toward tenants.

**3. Landlord and tenant 🔑165(3, 6)**

In action against owners of building by tenant's business manager for injuries sustained when manager fell into open freight elevator shaft at night, negligence of owners of building in failing to light elevator or shipping room in which elevator was located, though a number of persons, including business manager, had been invited to use building to witness parade, and in failing to replace broken glass covering of emergency release button, so as to prevent use of emergency release, which would permit elevator to be moved without doors to elevator shaft at first floor being closed, was the proximate cause of manager's fall into shaft while returning chairs which he and his guests had used when watching parade.

**4. Landlord and tenant 🔑169(11)**

In action against owners of building by tenant's business manager for injuries sustained when manager fell into open freight elevator shaft at night, whether owners of building were negligent was for jury, where neither elevator nor shipping room where it was located was lighted, though a number of persons had been invited to building to witness parade, and building manager had knowledge of fact that glass covering emergency release button was broken so as to permit elevator to be moved without the doors to elevator shaft at first floor having been closed.

**5. Landlord and tenant 🔑169(6)**

In action against owners of building by tenant's business manager for injuries sustained when manager fell into open freight elevator shaft at night, evidence sustained finding that business manager was not negligent in not investigating whether elevator was on ground floor, where elevator could ordinarily not be moved while doors to elevator shaft at first floor were open, unless emergency device was used.

**6. Appeal and error 🔑999(3)**

Unless the Supreme Court could properly declare, as a matter of law, that acts and conduct of tenant's business manager were not those of an ordinarily prudent and careful person, jury's verdict for business manager, in personal injury action against owners of building, was final.

**7. Appeal and error 🔑1003**

In view of the fact that there is no standard for sufficiency of evidence to induce belief, a verdict will not be disturbed, unless evidence so clearly preponderates against verdict that appellate court cannot conclude that verdict was result of a due consideration of the evidence.

**8. Negligence 🔑105**

Before it can be said that one has "assumed the risk" of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard, since one does not assume the risks of danger which he has no reason to anticipate.

[Ed. Note.—For other definitions of "Assumption of Risk," see Words & Phrases.]

**9. Negligence 🔑136(2)**

In determining whether plaintiff in a personal injury action assumed the risk, question of plaintiff's knowledge and appreciation of danger or lack thereof is ordinarily one for the jury from the facts of the case.

**10. Landlord and tenant 🔑169(6)**

In action against owners of building by tenant's business manager for injuries sustained when manager fell into open freight elevator shaft at night, evidence sustained jury's finding that business manager did not assume the risk, where he did not know that elevator could be moved by emergency release when doors to elevator shaft at first floor were open.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Gerald De Graf against the Anglo California National Bank of San Francisco, sued as the Anglo California Trust Company, and T. C. Tilden for personal injuries. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

For prior opinion, see 85 P.2d 192.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Glensor & Schofield, of San Francisco, for respondent.

Philander B. Beadle and James Martin MacInnis, both of San Francisco, amici curiæ.

HOUSER, Justice.

The essential facts upon which the action herein was predicated, in substance, appear to be that at the time here involved plaintiff was the manager of the business of a tenant who occupied offices in a three-story office building which was owned by the defendants; that on November 14, 1936, a parade was to take place at night on the street on which the building faced, and although, ordinarily, the building was kept open during daytime office hours only, the manager of the building "invited" the tenants thereof to view the parade therefrom. Solely for that purpose, plaintiff, who was accompanied by some guests, arrived at the building at "dusk", which was at about 6:30 o'clock p. m. However, he decided that instead of using any portion of the building for the purpose of viewing the parade, he and the members of his party would occupy a portion of the sidewalk in front of the building. The ground floor of the building was divided into two main parts, namely, a front, or "display" room, and a rear, or shipping room. Adjoining the "display" room was a passenger elevator; and opening off the shipping room was a freight elevator, which was customarily used by tenants of the building, not only for the purpose of conveying freight, but also occasionally for the carriage of passengers. During the daytime, the defendants furnished an operator for the passenger elevator, but none for the freight elevator,—the latter service being performed by each tenant for himself. On the night when the parade occurred, the front or "display" room of the building was lighted, as also was a stairway from the first to the third floor, upon the latter of which was located the office of plaintiff's employer. Other than such light as "filtered" from the front or "display" room, over its transoms, the shipping room was unlighted; nor was the "cage" of the freight elevator otherwise illuminated. In order that he and the several members of his party might be made more comfortable while occupied in viewing the parade from the sidewalk, plaintiff procured from his office some chairs and empty boxes upon which his guests might be seated. In doing so, he used the freight elevator for the purpose of transporting himself, his younger son, and the chairs and boxes. A possible means of illuminating the freight elevator was available through the use of an electric light globe which was inconspicuously placed among the beams which composed the support for the incomplete roof of the said elevator. Three of the sides or walls, built up from a platform to form the enclosure or "cage" of the elevator, were of wooden construction and, on each floor, the entrance to the "cage" was afforded through the use of two wooden glass-paneled doors, which, except by the use of force, ordinarily could not be opened at any designated floor of the building unless at a time when the floor of the elevator "cage" was on a level therewith. Neither could such doors be opened on any specified floor of the building if at the same time the freight elevator was stationed with the entrance doors open at any other floor thereof. Nor could the elevator be operated in a normal manner unless the doors of the elevator shaft at all floors were closed. However, as to the operation of the freight elevator, each of such conditions was subject to control by the application of an electrical contrivance, or emergency release switch, which was made to operate by the use of a push-button, which was located in a (supposedly) glass-covered box within the "cage" of the elevator,—at least such was the substance of a requirement of a safety order that theretofore had been issued by the industrial accident commission, as follows:

"'The emergency release shall be so arranged that to operate the car under emergency conditions it shall be necessary for the operator to break a glass cover protecting the emergency release and to hold the emergency release in operating condition. The emergency release shall be so constructed and installed that it cannot be readily tampered with or plugged into the operating position.'" However, it appears that neither on the night when the said parade occurred, nor at any time within several months immediately preceding that occasion, had a glass cover been provided for the box within which was contained the emergency release. By some means, the glass had been broken and, although that fact was known to the defendants, the broken glass had never been replaced by a new one, or otherwise restored. The elevator was operated by the pulling of a rope or cable. By reason of the design of the elevator and the use for which it was intended, it was customary, when it was not in use, to keep it stationed at the first floor of the building, with the entrance doors thereof open. That such condition might be maintained, the defendants kept posted within the "cage" a large sign which read, "Elevator Must Be Returned To First Floor When Empty".

Shortly after the time when plaintiff arrived at the building on the evening hereinbefore indicated, and following his determination to secure chairs and boxes from his office to be used by the members of his party on the sidewalk in front of the building, he went through the front or "display" room,—thence, through the dimly-lighted shipping room to the freight elevator, the doors of which were open. On entering the freight elevator, he struck several matches in an endeavor to locate an electric light globe which he thought was located therein, but was unsuccessful in his search in that regard. Thereupon, he operated the unlighted freight elevator to the third floor of the building, where his office was located, procured the desired chairs and boxes and returned with them to the freight elevator, which he then operated to the first floor of the building; after which, he took the chairs and boxes to the sidewalk, where he and his guests used them in viewing the parade, which occupied a period of about three hours,—at the expiration of which time the lighting conditions within the building were identical with those which prevailed at the time when plaintiff procured the chairs and boxes as aforesaid. With regard to other pertinent conditions concerning the use of the freight elevator on that evening,—in accordance with the custom and the directions posted inside the "cage", to which reference hereinbefore has been had,—at the time when plaintiff took the chairs and boxes from the freight elevator, he left the elevator at the first floor, with its doors remaining open. However, it appears from the evidence that thereafter certain other tenants of the building had used the freight elevator; that they had left the doors of the shaft on the first floor open; and that, designedly, and by other than normal means had operated the elevator and had succeeded in "parking" the "cage" at the third floor. In that connection, notwithstanding denials by such tenants of the assumed fact that they had operated the emergency switch, the inference is deducible that in bringing about the results to which reference just has been had, the emergency switch within the elevator "cage" had been operated,—whether by the designated tenants, or by some other tenant, being immaterial as far as the issue regarding that matter is herein concerned. After the parade was ended, plaintiff endeavored to return the chairs and boxes to his office and, in so doing, as he approached the freight elevator, he had an ordinary straight-backed office chair in each hand, one held under each arm—"one was in front of * * * [him] and one was behind * * * [him]". His "eyes were open"; he was "facing towards the open elevator door"; and he was "looking through the elevator shaft from the door, to the back of the elevator". He did not light any matches, nor "put * * * [his] foot down to feel if the elevator—if the car was there". He did not put down "one of the chairs and feel anything". Plaintiff could see the "outline of the elevator door; * * * saw the open door * * * [but] could not see whether the elevator was there or not". Inside, it was "very dark". He "knew there was an emergency button there, but up to that time * * * did not know it [the elevator] would operate with the doors open". However, the "cage" was not there and plaintiff stepped into the open shaft, fell into the basement, and by reason thereof sustained injuries which constituted the basis for an action against the defendants for the recovery of a judgment for the damages thus sustained by him. From a judgment that was rendered pursuant to a verdict in favor of plaintiff, the defendants have prosecuted the instant appeal.

[1] The first point that has been presented by the appellants is that the evidence establishes the fact that at the time when the accident occurred, plaintiff was "a mere licensee", with the result that unless he was wilfully or wantonly injured by the defendants, no cause of action existed in favor of plaintiff. In that connection the respondent asserts not only that he went upon the premises of the defendants on the invitation extended to him by the defendants' building manager and for the purpose of viewing the parade, but also, as a matter of legal right derived from the relationship of landlord and tenant that existed between the defendants and plaintiff's employer. With respect thereto, as far as an assumed invitation having been extended by the defendants to plaintiff was concerned, the fact appears to be that although other tenants of the building had keys thereto, plaintiff—theretofore not having had any use for one—had never requested that such a key be furnished to him,—with the consequence that on inquiry by him directed to the manager of the building as to whether the building would be kept open on the night of the parade, plaintiff received the assurance that it would be kept open on that night. It is clear that if those facts were the only ones which were shown to be present in that connection, a question which related to the relationship that existed between the parties might become one for serious consideration; but considering the fact that plaintiff, as manager of the business of a tenant of the building, stood in a position equal to that of an actual tenant thereof and had a legal right to be in the building at any time during either the day or night, and that he therefore needed no "invitation" from the management of the building to occupy either the rented offices of his employer or any part of the building that ordinarily was used by the tenants thereof,—the tendered issue must be determined against the contention of the defendants in that regard. Furthermore, the additional circumstance that at the time when the accident occurred plaintiff was not engaged in the enjoyment of any "hospitality" which possibly might have been extended to him on the part of the defendants' building manager,—but, to the contrary, that he was exercising an implied right of a tenant of the building, not only in the occupation of the rented office of his employer, but also in an attempt to return to such office, as freight, certain personal property of which his employer was the owner, to-wit, the chairs and boxes which theretofore had been used by plaintiff and his guests in viewing the parade from the sidewalk, as aforesaid,—lends weight to the reasonableness of such conclusion.

[2] The next general criticism of the judgment is that it is lacking in evidentiary support of the implied conclusion that is contained in the verdict of the jury to the effect that "any negligence of the defendants proximately caused plaintiff's injuries". In that connection, obviously two questions are involved: First, whether the defendants were guilty of negligence; and, secondly, assuming that the first question should be answered in the affirmative, whether such negligence was a proximate cause of the accident. But as a foundation for a determination of the question whether the defendants were guilty of negligence, it is at least advisable to recall what general duty was owing by the defendants to the plaintiff. In that regard, the authorities uniformly appear to be to the effect that the defendants were required to use ordinary care. See Reuter v. Hill, 136 Cal.App. 67, 72, 28 P.2d 390; Hamilton v. Union Public Market, 15 Cal. App.2d 340, 342, 59 P.2d 459; Brown v. Pepperdine, 53 Cal.App. 334, 200 P. 36; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; Gulley v. Traders Oil Corp., 102 Cal.App. 557, 283 P. 97; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; 15 Cal.Jur., p. 741. In the case entitled Spore v. Washington, 96 Cal.App. 345, at page 350, 274 P. 407, 409, the rule was set forth as follows: "Where a building is let in flats or offices, or otherwise leased to individual tenants between whom no privity exists, the hallways, entrances, stairways, or other fixtures not being demised to the tenants or any particular tenant, but used in common by all, the landlord owes a duty to those visiting the premises and entering such passageways to visit a tenant, or at his invitation, express or implied, to use ordinary care to avoid injuring them, as they are invitees of both landlord and tenant." Consequently, the question whether the defendants were guilty of negligence is determinable by a solution of its corollary, that is, whether

the defendants failed to exercise ordinary care for the protection and safety of plaintiff. The answer to that question, like that to most others, is not capable of demonstration; nor may it be declared with confidence in the exactness of such statement that because, in a given set of circumstances, specified conduct would amount to negligence, the same conclusion should be reached in all circumstances where the same act or conduct of the defendants may be shown to have been present. It becomes of some importance to bear in mind such preliminary and thoroughly understood observations, for the reason that the instant case does not deal with an ordinary situation that would or might arise with respect to a landlord and a tenant of an "up-to-date" office building, located in the heart of a large city; but, to the contrary, it has to do with a comparatively small building of a special type, located on the fringe of "big business". It is quite obvious that conveniences which might be furnished to tenants in the former type of building, and the attendant care for their safety and protection while in the enjoyment of such tenancy, would materially differ from those which would or might be expected or required by tenants in a building of the latter class. For example, one might reasonably assume that a first-class office building would maintain day and night passenger elevator service; that at all times the building would be kept well and thoroughly lighted and air-conditioned; and that watchman and janitor service would be furnished which would include such inspection of halls and corridors that comparative safety in their use might be reasonably assured. But in a building such as was the one in which plaintiff's employer was a tenant, none of the conveniences such as those just enumerated would or might reasonably be expected to be furnished. To illustrate the existent situation in the instant case: At night, the building was not lighted; there was no passenger elevator service; the front doors of the building were locked; and, excepting at times when delivery of freight to a tenant was delayed beyond the usual business hours, the back door of the building was likewise barred. Such conditions ordinarily obtaining, no tenant of the building who sought to visit his offices at night would have a right to expect the same degree of care on the part of his landlord which otherwise might be required of him. But on the night of the parade, the conditions were somewhat changed. In effect, the defendants had "invited" plaintiff to view the parade from the building. To use the language of the defendants' building manager, he was "entertaining"; he was engaged in fostering "good will" between the defendants and the tenants of the building. He and one of his office assistants were present to receive the so-called guests, and to insure their privacy by not permitting "outsiders" to enter the building. To that end, he had gone to the extent of lighting not only the front or "display" room of the building, but also the entire stairway and the lavatory adjoining the shipping room thereof. Having lighted the stairway, it becomes manifest that he had anticipated that the tenants, or some of them, might prefer to use their own front windows for the purpose of viewing the parade. But, especially after a days' work, travel by way of stairs is not always deemed the most desirable method or means of arriving at upper floors of a building. Most people prefer to make use of an elevator for that purpose. The defendants' building manager knew that on occasions the tenants of the building used the freight elevator for passenger service. In reason, in the absence of the operation of the passenger elevator, it would seem that he well might have anticipated that the freight elevator would be pressed into service. In that connection, a separate situation requires consideration: Assuming that on the occasion in question the defendants' agent, or building manager, should have foreseen the likelihood that the freight elevator would be used for the purpose of carrying tenants to and from their respective offices,—in the exercise of ordinary care, what means should the building manager have adopted and employed for the safety and protection of such tenants? It would seem not unreasonable, as a measure of the degree of care to be required of the defendants, that both the freight elevator, and the approach thereto through the shipping room, should have been adequately lighted. But, as a matter of law, it may not be declared that, even though such lighting was furnished, the entire duty of the defendants necessarily ended. It may be remembered that, ordinarily (and without the use of force) the entrance doors to the freight elevator shaft could not be opened at any floor of the building, other than the basement, if the floor of the elevator "cage" were not on a level with the floor at which an attempt might be made to open such doors. Nor could the elevator be operated if the entrance doors to the shaft were open at any other floor; but that each of such conditions was controllable by means of an emergency release which could be set in operation by pressure on a button that, in accordance with the requirements of a safety order of the industrial accident commission, was located within a glass-covered box within the "cage". The manager of the building had undertaken the task of "entertaining" the tenants thereof; and he personally knew, or should have known, not only that the freight elevator might be used by them, but also of the conditions under which such operation might be made. He knew, or should have known, that neither the shipping room nor the freight elevator was lighted; and, had he given the freight elevator proper inspection, he would have discovered the fact that the emergency release was not protected from indiscriminate and untimely use by a tenant, or any other person, with the almost certain result that the entrance doors to the elevator shaft on any floor of the building might be left open without the "cage" of the elevator being at the floor at which such doors were open. Considering all the facts hereinbefore set forth, including the further facts that neither the shipping room nor the freight elevator was lighted, and that defendants' building manager had knowledge of the fact that the glass covering of the emergency release button had been broken, and, as a consequence thereof, there was nothing to prevent the possible use of the emergency release, and thus remove from effective operation the devices and appliances with respect to the proper opening and closing of the doors of the freight elevator which theretofore had been provided for the safety and protection of the tenants of the building,—it would seem clear that an appropriate question had arisen as to whether the defendants had failed in their duty to exercise ordinary care in the premises.

[3, 4] With respect to the contention of the appellants that, assuming (without conceding) they had been guilty of negligence, it did not appear that such negligence was the proximate cause of the accident, it need only be said that, aside from the possibility of the contributory negligence of plaintiff, the happening of the accident properly may be attributed to no other cause. It is inconceivable that, in the absence of some negligence on the part of the defendants, the accident would have occurred. In other words, had the building been adequately lighted; had the emergency release switch been properly protected from unwarranted use; or had the first floor of the building been timely inspected for the purpose of determining that the entrance doors to the freight elevator shaft were not left open at a time when the "cage" was not on a level with the floor thereof,—the likelihood of the happening of the accident would have been most improbable and remote. But, after all, the question whether the admitted conduct on the part of the defendants constituted negligence was one of fact to be determined, in the first instance at least, by the jury. McKeon v. Lissner, 193 Cal. 297, 223 P. 965; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646; Roach v. Wells Fargo Bank & Union Trust Co., 102 Cal.App. 380, 282 P. 967; Long v. John Breuner Co., 36 Cal.App. 630, 636, 172 P. 1132; 19 Cal.Jur., p. 719. Its finding thereon, and its implied decision that such lack of reasonable care, including inspection of the premises, was the proximate cause of the accident, are conclusive on this court.

[5-7] Likewise, the question of the asserted contributory negligence of plaintiff was for the jury. McKeon v. Lissner, 193 Cal. 297, 304, 223 P. 965; Jacobi v. Builders' Realty Co., 174 Cal. 708, 711, 164 P. 394, L.R.A.1917E, 696; Muller v. Hale, 138 Cal. 163, 167, 71 P. 81; 19 Cal.Jur. p. 735; Oles v. Kahn Bros., 81 Cal.App. 76, 81, 82, 253 P. 158; Roach v. Wells Fargo Bank & Union Trust Co., 102 Cal.App. 380, 282 P. 967. In the case entitled Jacobi v. Builders' Realty Co., supra, the action was brought to recover damages for the death of a person which occurred while she was attempting to use an automatic elevator in an apartment building. The defendants contended the deceased herself was guilty of negligence in not looking to see if the cage was in place when she opened the door of the elevator. The court in that case said that "* * * persons intending to use the elevator came to rely, and to a certain extent were entitled to rely, upon the fact that if they could open the door at all it would be because the cage was there". [174 Cal. 708, 164 P. 395, L.R.A.1917E, 696.] The court further ob-

served that, "Since knowledge of the defects in construction or in operation, or both, was not only chargeable against this defendant, but was actually possessed by it, it is too plain for discussion that in inviting tenants and their guests to use such a contrivance it was sheer negligence not at the same time to have adequately warned and protected them against dangers necessarily attendant upon the use of the elevator under this defective faulty construction or lack of repair. * * * The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked or be convicted of negligence, presents a question of reasonable argument *before a jury,* but one which cannot be resolved against plaintiffs as matter of law. * * *" (Emphasis added). So, in the instant case, the question whether plaintiff's conduct in the premises might fairly be said to have shown that he had been negligent in the sense that he had failed to use that degree of care which would have been used by an ordinarily prudent person was submitted for the consideration of the jury, and by its verdict, the pronouncement of the jury in effect was that plaintiff was "not guilty". Unless, as a matter of law, this court may properly declare that his acts and conduct were such that an ordinarily prudent and careful person would not have done the things that plaintiff did,—the conclusion that was reached by the jury is final. In that regard, the rule is stated in the case entitled Olcese v. Hardy, 40 Cal.App. 323, 329, 180 P. 666, 668, that: "There is no standard for the sufficiency of evidence to induce belief, and, unless the evidence so clearly preponderates against the verdict that the court cannot conclude that the verdict was the result of a due consideration of the evidence, the verdict will not be disturbed." Again, in the recent case entitled Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 455, 85 P.2d 152, 157, the court quoted the rule as follows: "'Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury.'" See, also, Norton v. Central Surety & Ins. Co., 9 Cal.App.2d 598, 51 P.2d 113; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. Without again reciting the evidence regarding plaintiff's acts, including the inferences that might have arisen therefrom,—in the light of all the circumstances shown to have existed in the case—from a legal standpoint, this court is unable to reach a conclusion with reference to plaintiff's conduct which would be in opposition to that which impliedly was declared by the jury.

[8-10] In addition to the foregoing considerations, the appellants present the point that, notwithstanding the possible existence of negligence on their part, by his use of the shipping room and the freight elevator, plaintiff assumed the risk of injury to himself; and that, as a consequence thereof, the judgment should be reversed. As hereinbefore has been stated, it reasonably could have been anticipated by the manager of the building that on the occasion in question both the shipping room and the freight elevator would be used by the tenants and their guests. But, even conceding the applicability of the doctrine of "assumed risk" to the instant case, it is clear, with reference thereto that the determinative question was whether, in consideration of all the circumstances, plaintiff conducted himself as a reasonable and prudent person. Pope v. Halpern, 193 Cal. 168, 175, 223 P. 470; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 538, 66 P.2d 651. "* * * One who knows, or as a reasonably prudent person ought to know, of a danger, may not place himself in its way, or proceed in spite of the danger, and yet recover from the one responsible for the dangerous condition. * * * But one is required to act in such circumstances only as a reasonable and prudent person, and, it is said, owing to the conditions of modern life, is required to incur a certain amount of risk in almost every act committed." 19 Cal.Jur., pp. 583, 585. Furthermore, it has been said, in effect, that "'The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence.'" Rasic v. Schultheiss, 121 Cal.App. 560, 570, 9 P.2d 550, 555; Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric R. Co., 42 Cal.App. 573, 184 P. 29. And before it can be said that one has "assumed the risk" of a specified

hazard, it must be shown that he had knowledge of the condition creating the hazard. One does not assume the risks of danger which he has no reason to anticipate. Williamson v. Fitzgerald, 116 Cal. App. 19, 2 P.2d 201. In the instant case the plaintiff testified he did not know that the elevator could be moved from the first floor if or when the doors thereto were open. The evidence showed that the normal position of the elevator, when it was not in use, was at the first floor, with the doors to the shaft left open. The plaintiff also knew of the sign posted by the defendants inside the "cage", directing that it be returned to the first floor when not in use, and he knew that normally it could not be stationed at any floor other than the first floor when the doors to the shaft on that floor were open. On the occasion in question plaintiff left the elevator at the first floor with the doors open and returned later to find the conditions apparently the same. The question of knowledge and appreciation of a danger or the lack thereof in an action of this nature is ordinarily one to be determined by the jury from the facts of the case. Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078; 19 Cal.Jur., p. 585. In the case of a freight elevator, the question whether an employee had assumed the risk of injury from falling was held to be for the jury, where there was a rule against riding on the elevator, but it was customarily disregarded by the manager and the employees. 10 Cal.Jur., p. 220; Goggin v. D. M. Osborne & Co., 115 Cal. 437, 47 P. 248. Likewise, the knowledge of an employee that the elevator which it was necessary for her to use was frequently in disrepair was held not to be sufficient of itself to charge her with an assumption of risk in traveling on it, where it had never exhibited a condition known to be dangerous. 10 Cal.Jur., p. 220; Rogers v. Ponet, 21 Cal.App. 577, 132 P. 851. Under appropriate instructions which were given by the court to the jury in the instant case, the question of the alleged assumption of risk by the plaintiff was submitted to the jury, and its implied answer thereto was in favor of the plaintiff. As a matter of law, this court is unauthorized to disturb that conclusion.

Although the appellants complain of the failure on the part of the trial court to give to the jury certain instructions which were offered by the defendants,—also, because at the request of plaintiff the trial court gave to the jury certain other instructions which the appellants assert were erroneous, this court is unable to discern that either by the giving of the latter instructions, or by the refusal to give the former, to the jury, the defendants were prejudicially affected. The instructions that were given to the jury were fair and the jury could not have been misled by them in any respect.

The judgment is affirmed.

We concur: CURTIS, J.; EDMONDS, J.; SHENK, J.; LANGDON, J.

---

14 Cal.2d 73

## LESLIE et ux. v. FEDERAL FINANCE CO., Inc.

L. A. 16302.

Supreme Court of California.
July 24, 1939.

Rehearing Denied Aug. 21, 1939.

**1. Mortgages 🔑621**

Where mortgagor attempted in good faith to comply with provisions of interlocutory decree, entitling her to purchase ranch, sold to mortgagee under power in trust deed, by certain day, and offered full performance eight days later, court should have compelled mortgagee to accept money tendered and complete transaction, in absence of evidence that mortgagee suffered substantial prejudice because of short delay or that full compensation could not have been made therefor. Civ.Code, §§ 3275, 3369.

**2. Vendor and purchaser 🔑18(3)**

Time is of essence of ordinary option contract and no forfeiture results from strict enforcement of its terms, as "option" is merely offer to sell and vests no estate in property to be sold.

[Ed. Note.—For other definitions of "Option," see Words & Phrases.]

**3. Mortgages 🔑599(2)**

Parties' agreement, embodied in interlocutory decree giving mortgagor right to purchase mortgaged ranch, sold to mortgagee under power in trust deed, by certain day, was not, strictly speaking, an option contract, but more in nature of contract of redemption, so that superior court had right to relieve against forfeiture of mortgagor's equity in property for failure to redeem within time limited. Civ.Code, § 3275.

**4. Judgment** ⟹297

An equity court is not deprived of power to extend time for performance of simple contract merely because it is embodied in consent decree.

---

In Bank.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action in equity by Charles C. L. Leslie and his wife, Catherine L. Leslie, against the Federal Finance Company, Incorporated, to impose a trust on property owned of record by defendant. From a judgment quieting defendant's title to the property, plaintiff wife appeals.

Reversed.

For prior opinion, see 85 P.2d 568.

Olson & Olson, of Los Angeles, H. C. Cameron, of Santa Ana, and Richard C. Olson and Olson & Ahlport, all of Los Angeles (Robert Clifton and Homer N. Boardman, both of Los Angeles, of counsel), for appellant.

Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, for respondent.

EDMONDS, Justice.

Appellant, Catherine L. Leslie who, with her husband, Charles C. L. Leslie brought this action to impose a trust upon property owned of record by respondent, challenges the correctness of the trial court's action in entering a final decree quieting respondent's title to it. The principal question presented for decision concerns the power of the superior court to extend the time for the performance of an interlocutory decree entered by consent of the parties.

In 1932, Catherine and Charles Leslie executed a deed of trust upon a walnut and citrus fruit ranch owned by them to secure, among other obligations, a note for $45,870 payable to the respondent. Subsequently, Mr. Leslie's interest in the property was acquired by a judgment creditor through proceedings under execution. Later in 1932, upon default in the performance of the trustors' obligations, the property was sold by the trustee under the power of sale reserved in the deed of trust. At this sale, upon a bid of $56,000, the respondent became the purchaser. Immediately following this sale, the Leslies transferred to the respondent farm implements and ranch equipment of an alleged value of $10,000.

In 1935, appellant and her husband brought the present suit in equity alleging that the respondent is a trustee of the real and personal property for their use and benefit. The purpose of the action is to compel a reconveyance of the property, secure an accounting of the income derived from its use, and, in the meantime, prohibit the respondent from transferring the property.

The complaint alleges that over a period of more than a year preceding the trustee's sale, in numerous conversations, J. A. George, active manager, vice-president, secretary and director of the respondent corporation, agreed with Mr. and Mrs. Leslie as follows: For the purpose of clearing title to the real property so that respondent's loan could be refinanced and plaintiffs' equity protected, the finance Company would cause the property to be sold under the power of sale contained in the trust deed and would purchase it at the trustee's sale. The Leslies were then to apply to the Federal Land Bank of Berkeley, California, for a substantial loan which would be secured by a first mortgage on the property. The amount obtained by this loan would be paid to and accepted by the respondent in reduction of their indebtedness to it. They were to remain in possession of and operate the ranch, the net proceeds of operation to be paid to the respondent and applied toward the payment of their indebtedness.

Other allegations are that after the trustee's sale further conversations were had in which it was agreed that Mr. and Mrs. Leslie would transfer to the respondent all farm implements and equipment used in the operation and maintenance of the ranch, which personal property was to be returned to them when the indebtedness secured by the trust deed should be refinanced. It is also alleged that a tentative commitment from the Federal Land Bank of Berkeley for a loan of $32,500 on the property was rejected by the respondent corporation; that since respondent had obtained title to the property under the trustee's deed, it had received net profits from the property in excess of $44,000, which it had refused to apply in reduction of the indebtedness; and that the aggregate of this profit and the loan agreed to by the

Federal Land Bank was more than enough to discharge all amounts owing to the respondent.

Respondent joined issue denying the allegations of the complaint respecting the oral agreement and the case went to trial in June, 1936. Following the introduction of the evidence presented on behalf of Mr. and Mrs. Leslie, the finance company moved for a nonsuit, which motion was denied. Thereupon the parties stipulated for the entry of an interlocutory decree.

In substance, this decree gave Mr. and Mrs. Leslie the right to purchase the ranch, including the farm tools and equipment, "at any time on or before the 10th day of December, 1936", for approximately $58,000 plus interest at 8 per cent, costs of litigation including respondent's attorney's fees and costs of maintaining and operating the ranch less deduction of net income from operations. Any dispute concerning the purchase price was required to be determined by the court on motion. The finance company was given the right to remain in possession to manage and operate the property until Mr. and Mrs. Leslie should exercise their right to buy, and upon payment of the purchase price, respondent was required to "execute to the plaintiffs, or their nominee, a grant deed to the real property hereinbefore referred to, free and clear of all liens and encumbrances made, done, or suffered by the defendant as of the date of purchase by the defendant of said real property at foreclosure sale of deed of trust but without covenant or warranty expressed or implied, the defendant being only required to convey to the plaintiffs the title to the real property which it acquired as purchaser under foreclosure of said deed of trust". The decree also required Mr. and Mrs. Leslie to pay the purchase price to the Orange County Title Company in Santa Ana, which was to pay it over to the respondent upon receiving the instruments of title to the property, after which they would be entitled to a final decree confirming their title to the real and personal property in them. However, the decree also provided that if "said moneys shall not have been received by said Orange County Title Company for the unconditional use of the defendant as provided in this decree on or before" the 10th day of December, 1936, "then the Court shall enter its final decree quieting title in the said defendant"; and "if said plaintiffs shall fail to make such payments as herein provided to be made by the plaintiffs to the defendant for the purchase of said property, then immediately after the time limited by this interlocutory decree, to wit, the 11th day of December, 1936, the defendant shall be entitled to a final decree quieting title to said real and personal property in said defendant. * * *" Shortly after the entry of this decree Charles C. L. Leslie assigned to his wife all of his rights thereunder.

On December 18, 1836, the required payment not having been made, respondent moved the court for entry of a final decree quieting title in it. By affidavit and testimony presented on that day and at a subsequent hearing held December 21st, the following facts were shown:

On December 7th counsel for respondent advised appellant that the total purchase price for the property, as computed by the respondent, in accordance with the terms of the interlocutory decree, would be $55,259.28 as of December 10th. Appellant had then interested one J. Roy Smith in buying the property, and late in the afternoon of December 10th Smith deposited $56,000 with the Orange County Title Company, for the account of the respondent, under escrow instructions which required the issuance of a policy of title insurance to Smith and his wife as a condition precedent to payment of the required amount to the respondent. Smith also entered into a written contract of purchase with appellant by which he agreed to buy the property for $68,000. This amount was to be paid by the $56,000 then on deposit and $12,000 to be deposited with the title company within 30 days. On the morning of December 11th counsel for the respondent telephoned to the title company and inquired whether there was any money on deposit with that company which it would pay to the respondent upon delivery by it of the instruments of title required by the interlocutory decree. It was informed that the money was on deposit but could not be paid out at that time. Later the same day respondent made a tender of the required deeds and assignments to the title company, and the latter refused payment upon the ground that the escrow instructions called for the issuance of a certificate of title to Smith which would require a title search and also required an additional deposit of $12,000 to be made by him. When a title search was completed on December 18th, the escrow holder stated that to clear the title a quitclaim deed and a dismissal of certain litigation would have to be obtained. There was some question also concerning the necessity for a release by respondent of a crop mortgage on the property.

However, in the course of the hearing, counsel for appellant stated that Smith had agreed to change the escrow instructions to permit an immediate and unconditional release from the escrow of the amount required to pay the respondent's demand in full. Mr. Smith later took the witness stand and confirmed this offer. The respondent, however, refused to complete the transaction.

Upon these facts the court found that since appellant had not complied strictly with the terms of the interlocutory decree, it had no power to compel appellant to accept the tender after the expiration of the time limited in the interlocutory decree. The motion was thereupon granted and a final decree quieting respondent's title to the property was later entered.

[1] The appellant urges that the trial court interpreted its equity powers too strictly, and in the absence of a showing that respondent was prejudiced by the short delay, the court had the right, which it should have exercised, to compel respondent to accept the money tendered to it and complete the transaction, thus relieving appellant against a forfeiture. This contention must be sustained. It is provided in section 3369 of the Civil Code that "neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case". Section 3275 of the same code provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in a case of grossly negligent, willful, or fraudulent breach of duty." These sections have been applied in numerous cases.

Thus, in Hopkins v. Woodward, 216 Cal. 619, 15 P.2d 499, the plaintiff licensed the defendant to produce and stage a play. Due to the illness of an actor the defendant was unable to commence performances on the date specified in the contract and plaintiff brought suit to terminate the license for breach of its provisions. The defendant showed that he was ready to produce the play a week after the time agreed and offered to compensate plaintiff for the delay. The court held that since the injury caused by the delay was compensable and the plaintiff had not been negligent, section 3275 of the Civil Code would not permit a forfeiture of the plaintiff's license, even though the contract expressly provided that his rights should terminate upon a breach of its provisions.

The same equitable doctrine was applied in Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776, 777. There the vendee of real property gave notes secured by deeds of trust on the property as payment on the purchase price. These notes contained a provision that they should become "null and void as to the balance of payments" in the event the vendor failed to perform a contract to care for the property. The vendee brought suit to cancel the notes and deeds of trust upon the ground that the vendor had not performed his contract. It was held that since there was nothing to show that the plaintiff could not be compensated in damages for the vendor's default, the provisions of the Civil Code which have been referred to prevented a forefeiture. Said the court: "Moreover, the action is in equity, to cancel the note and deed of trust. The settled doctrine, not only prevents a court of equity from enforcing a forfeiture (Cal.Civ.Code, § 3369), but requires that the court grant relief from it."

The recent case of Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849, illustrates the same principle. There the plaintiff was entitled to receive specified quantities of water from defendant's distributing system under a contract requiring the plaintiff to pay $50 on January 1st of each year. The contract also provided: "The payment of said sums at the time stated is a condition precedent to the right of the party of the second part to receive or use any water hereunder, and the failure to make such payment shall give the party of the first part the right without notice to terminate this contract." In a prior suit between the parties the plaintiff had been adjudged "entitled to have water delivered upon said land by the defendant * * * so long as the plaintiff shall henceforth comply with the requirements and conditions of said contract". For two years defendant had sent plaintiff advance notices of payments to become due, but in December, 1933, the usual notice was not sent and the plaintiff failed to make his payment on January 1, 1934. Eight days later defendant sent him a notice that his rights under the contract had been terminated. On January 11th plaintiff made a tender of $50 together with interest from January 1st, which was refused. In the action brought by the property owner for reinstatement of the contract, the defendant contended that time was of the essence of the contract and hence the plaintiff's rights had been forfeited. But the court held that time was not an essential element of the contract and that, even if it were, a court of equity had power to relieve against the forfeiture under the facts shown.

[2, 3] In the present case the finance company insists that the consent decree is nothing more than an option to purchase which was not exercised by the appellant within the time limited and that it terminated upon the expiration of that time. It is true that time is of the essence of the ordinary option contract and no forfeiture results from a strict enforcement of its terms, because an option is merely an offer to sell and vests no estate in the property to be sold. Wightman v. Hall, 62 Cal.App. 632, 217 P. 580; Williston on Contracts, vol. 3, Rev.Ed., p. 2389, § 853. However, the agreement of the parties embodied in the interlocutory decree is not, strictly speaking, an option. It is more in the nature of a contract of redemption. Appellant and her husband had formerly owned the legal title to the property, and from the facts alleged in their complaint, which presumably were proved prior to the entry of the consent decree, the plaintiffs retained an equitable interest in the property under the respondent's agreement to permit them to refinance the trust deed indebtedness. The interlocutory decree confirmed this interest by providing a period within which the plaintiffs might redeem their property. Hence a decree quieting title in the respondent necessarily caused a forfeiture of the appellant's equity which, as the record indicates, was worth at least $12,000.

Under the authorities cited, the superior court had the right to relieve against the forfeiture of this sum. Moreover, under section 3275 of the Civil Code the court would have been justified in making an order denying the motion for entry of a final decree. Relief to persons in situations substantially similar to that of the appellant has been permitted where the equities were far less favorable to the party in default. In Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363, 366, an interlocutory decree ordered the plaintiff's title to be quieted unless within 30 days after entry of judgment the defendant should pay $15,500 plus interest and certain other sums due under a contract for the sale of real property by plaintiff to the defendant's assignor. No payment was made within the time limited and plaintiff moved for final judgment. The motion was denied on a showing that defendant would be able to comply within a short time. Thereafter the court granted numerous extensions of time and permitted continuances which resulted in a delay of almost a year. The plaintiff finally sought a writ of mandamus to compel the trial court to enter a final decree in his favor. It was held that the court had power to enlarge the time of payment called for in the interlocutory decree and had not abused its discretion in the orders made. Concerning the equity power to supervise decrees, the court said: "The power of a chancery court to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance, has long been recognized. 'There are some cases of decrees which, although they are final in their nature, require the confirmation of a further order of the court, before they can be acted upon. In cases of decrees of foreclosure, the court will, upon application, enlarge the time for payment of the money, even though the final order has been enrolled.' Daniell's Chancery Practice, 6th Am.Ed., pp. 991-993. We find nothing in our statute or decisions which can be said to have been intended to limit the power of the superior court in a suit in equity to grant relief properly adjusted to the equitable rights of the parties as determined by the court, and to control the parties in all matters connected with their required obedience to the orders embodied in the decree."

[4] It is true that the case last cited did not involve a consent decree and that it has been generally held in other jurisdictions that a court of equity has no power to modify or vary the terms of decrees entered by the stipulation of the parties. But conceding the validity of this distinction in its general application to such decrees, upon principle there is no reason to deny the court's power to extend the time for performance, which exists with respect to a simple contract merely because it is embodied in a consent decree of the court.

The appellant attempted in good faith to comply with the provisions of the decree. She offered full performance eight days after the time required. Indeed, the finance company at that time refused to accept the payment of all principal, interest and charges claimed by it but insisted upon retaining the debtor's property notwithstanding the clear showing that Mrs. Leslie's default was not the result of gross negligence, or of a wilful or fraudulent breach of duty. There is no evidence that the respondent suffered any substantial prejudice as a result of the delay or that full compensation could not have been made for the delay. Under these circumstances it was the duty of the court to grant appellant the relief she sought.

The judgment is reversed.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.

---

14 Cal.2d 102

## McALLISTER et al. v. DRAPEAU et al.

L. A. 16595.

Supreme Court of California.

July 27, 1939.

Rehearing Denied Aug. 24, 1939.

**1. United States 🔑53**

The main and controlling purpose of the Home Owners' Loan Act is to assist small home owners who, because of existing financial conditions, face loss of their homes through inability to meet the charges due on mortgages. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

**2. United States 🔑53**

A creditor may refuse to accept an offer of the Home Owners' Loan Corporation as to amount of bonds and cash it will advance to refund a mortgage debt, and neither the corporation nor the debtor can compel the creditor to accept the offer. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

**3. Contracts 🔑123(1)**

Building and loan association's action in taking a secret second lien from mortgagors after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property violated letter and spirit of Home Owners' Loan Act and corporation's regulations, and hence the second mortgage was illegal. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

**4. United States 🔑53**

The Home Owners' Loan Act was intended solely for the benefit of home owners who were in financial difficulties, and any benefit to creditors of home owners is merely incidental. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

**5. Accord and satisfaction 🔑1**
**Mortgages 🔑309(3)**

Where building and loan association took a secret second lien from mortgagors after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property, there was a valid "release," and an "accord and satisfaction." Civ.Code, §§ 1524, 1541; Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

[Ed. Note.—For other definitions of "Accord and Satisfaction" and "Release," see Words & Phrases.]

**6. Contracts 🔑139**

Where parties are in pari delicto, neither can secure affirmative relief at law or equity, but where one party is involved to some extent in the illegality, but the second party is grievously at fault, and first party only slightly at fault, the court will allow recovery of moneys paid under an executory contract.

**7. Contracts 🔑139**

The fact that mortgagors took part in illegal transaction whereby building and loan association took a second lien from mortgagors after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property, would not preclude mortgagors from recovering money paid on second mortgage note to association, on ground that mortgagors were in pari delicto, where mortgagors executed second mortgage under threat of foreclosure and were not entirely free agents, since the mortgagors were not "in pari delicto" with the association. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

[Ed. Note.—For other definitions of "In Pari Delicto," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Charles McAllister and Elnore McAllister against Louis C. Drapeau, successor to Friend W. Richardson as Building and Loan Commissioner for the State of California in charge of liquidation of the California Security Loan Corporation, and the Title Guarantee & Trust Company, to cancel a note and trust deed executed by plaintiffs and to recover sums paid by the plaintiffs on the note. From a judgment in favor of the plaintiffs, Louis C. Drapeau appeals.

Judgment affirmed.

Prior opinion, 85 P.2d 523.

Robert Lee Collins and Britton Bowker, both of Los Angeles, for appellant.

A. J. Coogan and James M. McGrath, both of San Francisco, and Ewell D. Moore, of Los Angeles, (Dudley J. Scholten, of Washington, D. C., of counsel), amici curiae for Home Owners' Loan Corporation.

Allard, Holbrook & Whyte, of Pomona, and Roland J. Brownsberger, of La Verne, amici curiae for California Building-Loan League.

O'Melveny, Tuller & Myers, Walter K. Tuller, Louis W. Myers, and Pierce Works, all of Los Angeles, amici curiae for California Land Title Ass'n.

Felix M. Cunningham, and Lawrence F. Edmisten, Jr., both of Beverly Hills, and John Henry Peckham, Jr., of Los Angeles, for respondents.

PER CURIAM.

Defendant appeals from a judgment cancelling a promissory note and deed of trust executed by plaintiffs, and from a money judgment in favor of plaintiffs for the sums paid by them on the note.

The facts are not in dispute, and are as follows:

In 1929 plaintiffs borrowed fom the California Security Loan Corporation, appellant's predecessor in interest, the sum of $11,050, which debt was secured by a first deed of trust on plaintiffs' home property. By the year 1934 this indebtedness had been reduced to $8,271.26. In that year plaintiffs defaulted on their payments on the note, and, as a result, were in imminent danger of losing their home property by sale under or foreclosure of the deed of trust. On or about July 1, 1934, plaintiffs applied to the Home Owners' Loan Corporation for a loan to refinance the indebtedness owed to the California Security Loan Corporation. The H. O. L. C. appraised the property at $8,650, and informed the plaintiffs it was willing to lend them, in cash and bonds of the corporation, the sum of $5,984.38, of which $5,850 was to be used to pay off the California Security Loan Corporation, the balance to be used to pay taxes, escrow fees and title charges. Plaintiffs notified California Security Loan Corporation of the offer. That company informed the plaintiffs, as found by the trial court, that it "would only consent to take said bonds of H. O. L. C. on the condition that plaintiffs execute a note for $1,300, secured by a second trust deed" on their home property. The California Security Loan Corporation also informed plaintiffs that unless the plaintiffs executed such note and trust deed they would go ahead with foreclosure proceedings under the original trust deed held by them. Under such circumstances, on or about July 16, 1934, the plaintiffs executed the $1,300 note secured by a second deed of trust on the property, and delivered the documents to the California Security Loan Corporation. The trial court found that such execution and delivery was made "under threat of foreclosure", and that "the plaintiffs acted as any reasonable and prudent man would act in order to preserve his home property". It was also found that neither plaintiffs nor California Security Loan Corporation informed H. O. L. C. of the fact the $1,300 note and second deed of trust had been executed, and that the H. O. L. C. had no notice or knowledge of their existence until shortly before January of 1937 when this present action was instituted.

On August 1, 1934, after securing the $1,300 note and second deed of trust from plaintiffs, the California Security Loan Corporation entered into an agreement in writing with the H. O. L. C. to accept H. O. L. C. bonds in the amount of $5,850 in full settlement of its claim against the property. This agreement is entitled "Mortgagees Consent to Take Bonds", is addressed to the H. O. L. C., and reads as follows:

"The undersigned is a holder of a first mortgage or other obligation, which constitutes a lien or claim on the title to the home property of—Charles and Elnora McAllister located at 1171-73½ E. 49th Street Los Angeles California the sum of $———, including unpaid balance of principal and interest, to date.

"Being informed that said owner has made application to Home Owners' Loan Corporation to refund his said indebtedness, the undersigned has considered the method of refunding mortgages provided in Home Owners' Loan Act of 1933, as passed by Congress and approved by the President, and the undersigned hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of $5,850.00, face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding $25 cash and thereupon to release all the claim of the undersigned against said property. We agree to accept Bonds in conformance with Home Owners' Act Amendment of April 28, 1934.

"It is understood that the Home Owners' Loan Corporation will incur trouble and expense in connection with its efforts to refund the indebtedness of said home owner, and this consent is executed in consideration of the same and shall be binding for a period of 30 days from date, and thereafter until 10 days written notice shall have been given the State manager of the Corporation."

On August 1, 1934, the H. O. L. C. issued its bonds in the sum of $5,850, and delivered the same to the California Security Loan Corporation. That company released its first deed of trust, and after the H. O. L. C. had recorded its deed of trust, it recorded its second deed of trust. Over a period of time the plaintiffs paid to California Security Loan Corporation $275 on the $1,300 note, and then commenced this action against the building and loan commissioner (he having taken over California Security Loan Corporation for purposes of liquidation) to cancel the note and deed of trust, and to recover the amounts paid thereunder.

There are three main questions involved on the appeal. First, does the statute under which H. O. L. C. was organized, or do the rules and regulations adopted pursuant to such statute, expressly or by necessary implication prohibit the creditor from taking secret second liens, when such secret second liens are to secure a part of the very indebtedness refunded by the H. O. L. C.? Second, what is the legal effect of the document entitled "Mortgagees Consent to Take Bonds", above quoted? Third, if the transaction is illegal, should affirmative relief be granted to plaintiffs, participants in the illegal transaction?

The Home Owners' Loan Act of 1933 (48 U.S.Stats. at Large, 128, 12 U.S.C.A. § 1461 et seq.) declares that the act was passed "to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere * * *." Briefly, the act provides that the Federal Home Loan Bank Board is authorized to create a corporation to be known as the Home Owners' Loan Corporation as an instrumentality of the United States. To refinance existing mortgages the corporation was authorized to issue 4 per cent tax exempt bonds in an aggregate amount not to exceed $2,000,000,000 (later increased to over $4,000,000,000). Originally these bonds were guaranteed by the United States only as to interest, but later the principal was also guaranteed. During the period 1933 to 1936 the corporation was authorized to exchange its bonds for home mortgages in amounts not to exceed $14,000 in any one case, and in any event not to exceed 80 per cent of the appraised value of the real property. The act contemplated that the creditor would, in many cases, accept bonds in an amount less than the indebtedness due him. In that connection the act provides: "In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owner owes with respect to the home mortgage * * * so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent." 12 U.S.C.A. § 1463(d). The corporation was authorized to amortize its loans to home owners over a fifteen-year period at an interest rate of not to exceed 5 per cent. It was authorized, not only to refinance loans of home owners who were faced with foreclosure, but also to make loans to home owners for the purpose of redeeming or repurchasing home properties already foreclosed or sold under a deed of trust or power of sale. Section 8(a) of the act, 12 U.S.C.A. § 1467(a), provides that every person who "makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act [chapter]" shall be guilty of a criminal offense. The act also empowered the board to "make such bylaws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation". 12 U.S.C.A. § 1463 (k). Acting pursuant to this power, the board adopted several resolutions outlining the policy to be adopted towards the making of loans when the creditor insisted on a second mortgage to secure part of the refunded debt. On September 8, 1933, the following resolution was adopted:

"The Corporation may take up second mortgages or other inferior liens, provided the same is done along with the first mortgage and the total is within the Act. The Corporation has no means of preventing the home owner from undertaking to pay any indebtedness he may owe over and above that refunded by the Corporation and has no means of preventing his giving a second mortgage or other security for any such indebtedness. However, State Managers are directed, as a matter of policy in dealing with home owners, to decline to conclude a refunding of a portion of the indebtedness against the home where the home owner is proposing to give a second mortgage for any excess indebtedness he may owe unless such second mortgage financing is so arranged that the home owner will have a reasonable probability of being able to carry his first mortgage to the Corporation and the second mortgage indebtedness."

On November 3, 1933, the following resolution was adopted:

"In the case of bond exchange loans, if the home owner owes more than 80 per cent of the value of his premises he may remain indebted for that portion that the Corporation cannot refund, provided the Corporation secures a first lien, and he may secure the excess indebtedness with a second lien. However, such refunding will not be carried through unless such excess indebtedness is placed on a payment basis so that the home owner will have a reasonable opportunity to pay the same and meet his obligations to this Corporation. The Corporation will not proceed to refund indebtedness for mortgagees who insist upon more in face value of bonds or who insist upon any other consideration (such as second mortgage, cash or other consideration) than the net amount owing to such mortgagee, together with accrued (sic) interest to date of exchange."

On January 9, 1934, the following resolution was adopted:

"Whereas it is the policy of Home Owners' Loan Corporation to endeavor to make complete settlement in the refunding of home mortgage indebtedness in all cases where such is possible, and

"Whereas second mortgages for excess indebtedness over and above that which the Corporation can refund are permitted only in limited cases and then only on a basis so that the Home Owner will have reasonable probability of being able to pay his full obligation to the Corporation and meet the terms of such second mortgage indebtedness, and

"Whereas it is necessary for each case to be considered on its merits and in the light of all the circumstances of the property involved and the applicant, therefore

"Be it resolved by the Board of Directors of Home Owners' Loan Corporation that the following principles be followed in all cases where the Corporation can refund only a portion of the indebtedness against a home:

"(1) If the home owner's income is so reduced that he is unable to meet full amortization payments from the beginning on his obligations to the Corporation, the second mortgage shall not require any principal payments prior to June 13, 1936, and payments thereafter shall be on a schedule which the home owner may reasonably be able to meet.

"(2) In all cases where the home owner is able to meet his full amortization payments to the Corporation from the beginning and is able to make additional payments from the beginning on the second mortgage, then the second mortgage may be amortized from the beginning, provided the payments thereon are not in excess of what the home owner may be reasonably able to pay and at the same time keep his obligation to the Corporation, making full amortization payments.

"(3) In cases where the home owner is a man of substantial means or is a man with substantial prospective income but is temporarily distressed so that it is proper for the Corporation to refund his indebtedness, any second mortgage indebtedness may be placed on any reasonable basis."

[1-3] It is obvious, from a reading of the statute and the rules and regulations above quoted, that the main and controlling purpose of the act was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property. It is to be noted that the act places no compulsion, direct or indirect, on the creditor. The creditor had complete liberty of action. If he refused to accept the offer of the H. O. L. C. as to the amount of bonds and cash it would advance to refund the debt, there was nothing the H. O. L. C. or the debtor could do about it. It was contemplated, however, that many creditors would, and experience under the act proved that many did, accept a reduction in the amount of the existing loan in order to secure liquid assets such as bonds of the H. O. L. C. rather than foreclose on the property and have to hold it until conditions in the real estate market improved. The act provides that such reduction should be passed on to the home owner, the debtor. The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, but such rules and regulations provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations. This is demonstrated not only by the terms of the statute and the regulations, but also by the language of the agreement above quoted that all creditors were required to sign wherein the creditor represented and agreed that he was accepting the bonds "in full settlement of the claim of the undersigned".

[4] The obtaining of secret second liens by the creditor violates the basic public policy expressed in the act. The act was intended solely for the benefit of home owners who were in financial difficulties—no one else was eligible for its benefits. Any benefit to creditors was merely incidental. But if a creditor could lawfully exact a secret second lien from his debtor, in many cases this would confer the benefits of the act on the creditor rather than on the debtor. Thus, in every case where the terms of the secret second lien were such that the debtor was financially unable to pay off both the first and second, the holder of the second, upon default by the debtor, could foreclose his second lien, and the holder of the second would obtain the property subject to the mortgage of the H. O. L. C.—a fifteen-year amortized mortgage at a low rate of interest—a very favorable type of mortgage which at that time was not generally available. In this way the creditor could and would circumvent the policy of the act and would obtain benefits never intended for him. This is not an unlikely possibility when it is considered that the benefits of the act were only available to home owners who were already in default on their first mortgage.

The above views have been expressed by many courts which have been called upon to decide the validity of secret second liens exacted by the creditor from his debtor as a condition to acceptance of the bonds of the H. O. L. C. Our examination of the authorities has failed to disclose a single case upholding the validity of such secret second mortgage. The various appellate courts which have been called upon to decide the issue have uniformly held that such secret second liens are void and unenforceable. Jessewich v. Abbene, 154 Misc. 768, 277 N.Y.S. 599; First Citizens Bank & Trust Co. v. Speaker, 159 Misc. 427, 287 N.Y.S. 831; Id., 250 App.

Div. 824, 294 N.Y.S. 737; Anderson v. Horst, 132 Pa. 140, 200 A. 721; Stager v. Junker, 188 A. 440, 14 N.J.Misc. 913; Chaves County Building & Loan Ass'n v. Hodges, 40 N.M. 326, 59 P.2d 671; Cook v. Donner, 145 Kan. 674, 66 P.2d 587, 110 A.L.R. 244; Pye v. Grunert, 201 Minn. 191, 275 N.W. 615, 276 N.W. 221; Meek v. Wilson, 283 Mich. 679, 278 N.W. 731; United States v. Kreidler, D.C., 11 F. Supp. 402; see, also, United States v. Kay, 2 Cir., 89 F.2d 19, decided by United States Supreme Court on other grounds, Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607; Daniel H. Council et al. v. Samuel Cohen, 21 N.E.2d 967, decided June 26, 1939, by the Supreme Judicial Court of Massachusetts; Dayton Mortgage and Investment Co. v. Theis,[1] decided May 18, 1939, in the Court of Appeals of Montgomery County, Ohio. In Bay City Bank v. White, 283 Mich. 267, 277 N. W. 888, and in Ridge Investment Corp. v. Nicolosi, 193 A. 710, 15 N.J.Misc. 569, it was held that second liens taken by the creditor with the full knowledge of the H. O. L. C. are valid. See, also, Sirman et al. v. Sloss Realty Company, Inc., Ark., 129 S.W.2d 602. These cases are not in conflict with those first above cited. In Bay City Bank v. White, supra, and Ridge Investment Corp. v. Nicolosi, supra, the H. O. L. C. refunded the debt with full knowledge of the existence of the second lien and, presumably, after first ascertaining, in accordance with its regulations, that the debtor could carry both mortgages. The weakness of the instant case is that the existence of the second lien was kept secret from the H. O. L. C. so that it was induced to make the loan in the belief its mortgage was the only lien against the property. The cases first above cited hold that such secrecy is tantamount to a fraud on the H. O. L. C. The case of Bank of America v. Glick, decided by the appellate department of the superior court of Los Angeles (case No. 470), certiorari denied, Glick v. Bank of America Nat. Trust & Savings Ass'n, 305 U.S. 657, 59 S.Ct. 357, 83 L.Ed. —, is in no way contrary to the conclusions herein stated. From the memorandum opinion rendered by the appellate department of the superior court in that case, it definitely appears that the creditor informed the H. O. L. C., by letter, at the time of signing its consent to take the bonds, that "The amount we are to receive as mentioned in our amended consent, is less than the total amount of the indebtedness, and the borrowers have agreed to make a satisfactory adjustment of the deficiency." This case falls within the rule of the two cases last above referred to.

[5] Several of the courts to which the problem here involved has been presented, in addition to holding the secret second mortgage illegal, have held that in signing the "Mortgagee's Consent to Take Bonds", above quoted, the creditor agreed to accept such bonds "in full settlement" of his claim, and that such agreement constitutes an accord and satisfaction, a release or a novation. Cook v. Donner, supra; Chaves County Building & Loan Ass'n v. Hodges, supra. The holding of these courts is sound. The agreement signed by the creditor was to accept the bonds "in full settlement of the claim of the undersigned * * * and thereupon to release all the claim of the undersigned against said property". The argument of amici curiæ that this broad language only constitutes an agreement by the creditor to release his security and does not constitute an agreement to release the debt secured is unsound. In the instant case, at the time California Security Loan Corporation signed the consent, the debtor owed it but one debt, which was secured by the recorded first mortgage, and partially secured by the secret unrecorded second mortgage. By signing the consent, that company agreed to release its entire "claim". This could have no reasonable meaning other than that it was an unqualified agreement in writing to release the existing debt for the amount of bonds offered. This constitutes a valid release, and an accord and satisfaction. Sections 1524, 1541, Civ.Code.

[6, 7] The last point urged by appellant is that, admitting the note and second mortgage are void and illegal, the plaintiffs were participants in the illegal transaction, were therefore in pari delicto, and cannot, for that reason, secure affirmative relief. It is, of course, true that where parties are in pari delicto neither can secure affirmative relief at law or equity. But it is equally true that where one party is involved to some extent in the illegality, but where the second party is grievously at fault and the first party only slightly at fault, the court will allow recovery of mon-

---

[1] Not yet released for publication.

eys paid by the first party under the executory contract. Smith v. Bach, 183 Cal. 259, 191 P. 14; Woodham v. Allen, 130 Cal. 194, 62 P. 398; Daniels v. Tearney, 102 U.S. 415, 26 L.Ed. 187. This exception to the rule has obvious application to the facts of the instant case. The Home Owners' Loan Act was passed solely and exclusively for the benefit of small home owners. The plaintiffs are of that class. In executing the secret second lien they did so under threat of foreclosure. They were not entirely free agents. They faced the loss of their home and were in desperate circumstances. In executing the secret second lien they acted, as found by the trial court, as any reasonable and prudent man would have acted under the circumstances. They were, therefore, not in pari delicto with the California Security Loan Corporation. The exception and limitation to the main rule is stated in 1 Pomeroy's Equity Jurisprudence, section 403, page 756, as follows: "The first of these limitations may be given in the following general formula, and all the others may be regarded as merely particular deductions or corollaries from it. Assuming that a contract is fraudulent, or against public policy, or illegal, still, where the parties to it are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief, relief may be given to him, either against the transaction by setting it aside and restoring him to his original position, or even, in some cases, by enforcing the contract, if executory."

The instant case, for reasons already stated, clearly presents a situation where the general rule should not be applied. It should also be mentioned that this illegality argument has no application to the second ground set forth in this opinion, namely, that the "Mortgagee's Consent" constituted a release, and an accord and satisfaction.

It is also urged that the H. O. L. C. is not a party to this appeal, and that it is the only one that can raise the question of illegality. The corporation has presented its views in the action as an amicus curiæ, and vigorously assails the legality of the transaction.

The judgment appealed from should be and hereby is affirmed.

## LAWRENCE et al. v. I. N. PARLIER ESTATE CO. et al.*

Civ. 2277.

District Court of Appeal, Fourth District, California.

July 26, 1939.

Hearing Granted Sept. 21, 1939.

**1. Corporations 🔑197**

Under the Civil Code provisions, relating to corporations, stock pledged to corporation by shareholder to secure debt to corporation was properly voted at shareholders' meeting by person in whose name the stock stood on the corporation's records as trustee for the corporation, rather than by the pledgor. Civ.Code § 277 et seq., as added by St.1931, p. 1762; §§ 310, 313, 315, 316, 320a, 320b, 330.1.

**2. Corporations 🔑283(1)**

Where motion to adjourn shareholders' meeting was properly carried by majority vote, action taken by part of the shareholders subsequent to the adjournment in removing the then members of the board of directors and electing new members was void and ineffective. Civ.Code, §§ 310, 313, 316. 320a, 320b.

**3. Corporations 🔑197**

Under the Civil Code provisions relating to corporations, stock was properly voted at shareholders' meeting by person in whose name the stock stood on the books of the corporation, notwithstanding the stock had been pledged by such person to secure debt to the corporation. Civ.Code, §§ 320a, 320b.

**4. Corporations 🔑197**

Under statute authorizing stock to be voted at shareholders' meeting by persons in whose names the stock stands on the books of the corporation, the rule that stock pledged to a corporation to secure a shareholder's debt to the corporation partakes of the nature of treasury stock and cannot be voted in a stockholders' meeting cannot prevail, where such pledged stock certificates have not been delivered into the actual possession of the corporation as pledgee but stand in the names of the pledgors or of a trustee for the corporation. Civ.Code, §§ 320a, 320b.

**5. Pledges 🔑1**

A "pledge" is a deposit of personal property with another to secure the performance of some act by the pledgor and merely creates a lien on the pledged property that can ripen into title only by a foreclosure of the pledge. Civ.Code, § 2986.

---

*For subsequent opinion see 100 P.2d 765.

[Ed. Note.—For other definitions of "Pledge," see Words & Phrases.]

**6. Corporations 🔑197, 123(7)**

Where stockholder pledged stock to secure debt to the corporation but no certificate for the shares was issued to the corporation, title to the pledged stock was not vested in the corporation by the pledge and it was not owner of the stock at time of stockholders' meeting so as to prevent voting of the stock at the meeting. Civ.Code, §§ 320a, 320b.

**7. Corporations 🔑391**

Corporations are creatures of statute and subject to legislative control.

**8. Constitutional law 🔑26**

The Legislature may exercise all legislative powers not denied to it by the State Constitution or not inconsistent with the State or Federal Constitution.

**9. Corporations 🔑197**

The clear and unambiguous provisions of the Civil Code were intended to give all pledgees and trustees and other persons having stock standing in their names as such on the books of the corporation the right to vote such shares. Civ.Code, §§ 320a, 320b.

◆

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Action by Lula G. Lawrence and others against the I. N. Parlier Estate Company and others to determine the legality of an attempt to remove an old board of directors and of the election of three new members of the board. From an adverse judgment, defendants appeal.

Judgment reversed, with directions.

Hayhurst & Gibson, of Fresno, for appellants.

W. M. Conley, Philip Conley, Matthew Conley, R. Z. Lamberson, and Conley, Conley & Conley, all of Fresno, for respondents.

MARKS, Justice.

This is an action brought under the provisions of section 315 of the Civil Code to determine the legality of an attempt to remove an old board of directors and of the election of three members of the board of directors of the I. N. Parlier Estate Company. The trial court found that Lula G. Lawrence, G. W. Parlier and E. B. Campbell were the duly elected directors of that company and entered judgment accordingly. This judgment is before us for review.

At the written request of two shareholders a special meeting of the shareholders was called by the board of directors for October 15, 1938, under the provisions of section 313 of the Civil Code.

The company had issued 2499-1/9 shares of its capital stock. Nora Osterhout, the owner of 415-6/9 shares, had died and in the probate of her estate this stock had been distributed to the corporation. It is admitted this stock then assumed the status of unissued treasury stock which could not be voted at a shareholders' meeting. It was found by the trial court that Bessie N. Parlier, formerly an owner of one share of stock, was not a shareholder at the time of the meeting. This left 2082-4/9 shares of issued stock which might be represented and voted at the special meeting.

On October 15, 1938, the books of the company showed the following ownership of the issued stock: Lula G. Lawrence, 277-7/9 shares; Carrie A. Thomas, 277-7/9 shares; C. A. Parlier, 277-7/9 shares; C. A. Parlier, trustee for I. N. Parlier Estate Company, 275-7/9 shares (formerly owned by G. W. Parlier and pledged to secure his debt to I. N. Parlier Estate Company); J. B. Parlier, 277-7/9 shares; Ada Sharp, 415-7/9 shares; National Bankitaly Company, 275-7/9 shares; G. W. Parlier, 2 shares; W. W. Parlier, 2 shares.

At the meeting the shareholders divided into two groups. C. A. Parlier, in his individual capacity and as trustee, J. B. Parlier, Ada Sharp and W. W. Parlier, whom we will refer to as the defendant group, representing 1249-1/9 shares, voted as one unit. The other shareholders, representing 833-3/9 shares, whom we will refer to as the plaintiff group, voted as another unit.

The special meeting was called to order by the president of the company and, as a quorum was present, the meeting proceeded to the consideration of the business specially noted in the call. There was then presented and filed a written request and direction to C. A. Parlier to vote all the stock held by him, or standing in his name "as trustee or in any other fiduciary capacity" for the removal of all the directors of the company and thereafter to vote in favor of G. W. Parlier, Lula G. Lawrence and E. B. Campbell as new directors. This request was signed by Lula G. Lawrence, Corporation of America by E. B. Campbell, Philip Conley and H. L. Jacobs, its proxies, Carrie A. Proctor, by Lula G. Lawrence, her proxy, and G. W. Parlier. It should be here observed that the Corporation of America and Carrie A. Proctor did not appear as shareholders on the books of the company.

A motion was made to adjourn the meeting for two weeks to October 29, 1938. All the stock of the defendant group (1249⅙ shares) was voted in favor of the motion. It was declared carried, the meeting was declared adjourned for two weeks and the defendant group left. The plaintiff group of shareholders remained. They proceeded to elect a temporary chairman and a temporary secretary, passed a motion removing all of the then members of the board of directors and elected Lula G. Lawrence, G. W. Parlier and E. B. Campbell as directors. In this meeting G. W. Parlier voted the 275-7/9 shares of stock formerly owned by him. These were the shares pledged to secure his debt to the I. N. Parlier Estate Company, a certificate for which had been issued to C. A. Parlier, trustee. Whether C. A. Parlier, the trustee, or G. W. Parlier, the trustor or pledgor, had the right to vote that stock is the first and important question to be considered. If C. A. Parlier, the trustee, had the legal right to vote the stock in favor of the motion to adjourn the meeting for two weeks, to October 29, 1938, that motion was carried and no further business could be transacted by the shareholders on October 15, 1938.

The provisions of the Civil Code pertaining to the organization and government of corporations were amended in 1931. Stats.1931, p. 1762 et seq. In so far as we are advised, there is no reported case in California touching on the precise question before us here under these amended code sections.

Section 310 of the Civil Code provides that a board of directors of a corporation "may be removed from office by a vote of shareholders holding a majority of the outstanding shares entitled to vote at an election of directors".

Section 313 of the Civil Code authorizes the calling and holding of special meetings of the shareholders.

Section 316 of the Civil Code provides that the presence of a majority of the shares entitled to vote at any meeting shall constitute a quorum for the transaction of business. After the meeting is once regularly opened with a quorum present the withdrawal of part of the shareholders does not interfere with the power of those remaining to transact business until the adjournment of the meeting.

Section 330.1 of the Civil Code provides the manner in which the title to certificates and the shares represented thereby may be transferred.

Section 320a of the Civil Code contains the following: "Subject to the provisions of sections 320b and 320c of this title, only persons in whose names shares entitled to vote stand on the stock records of the corporation on the day three days prior to any meeting of shareholders, or, if some other day be fixed for the determination of shareholders of record, then on such other day, shall be entitled to vote at such meeting."

Section 320b of the Civil Code contains the following: "(1) Shares standing in the name of any person or persons as pledgee, trustee or other fiduciary may be voted and all rights incident thereto may be exercised only by such pledgee, trustee or other fiduciary in person or by proxy, and without proof of authority."

The following text supports the rule that where, as in California, the statute gives the person who appears as owner, either as owner or pledgee, the right to vote such stock, that right is absolute. 6a Cal.Jur. 664, 668, 401.

[1, 2] We can see no difference in principle between permitting a pledgee to vote stock standing on the books of a corporation in his own name and in allowing a trustee to have the same right. The code (sec. 320b, Civ. Code) gives both the same right to vote the stock. We, therefore, conclude that under the authority of the Civil Code the stock formerly standing in the name of G. W. Parlier, which stood in the name of C. A. Parlier, trustee, at the time of the meeting, was properly voted by the latter in favor of adjourn-

ment of the meeting and that the motion was properly carried. It follows that all of the proceedings taken by the plaintiff group of shareholders, after the motion to adjourn the meeting for two weeks had been carried, were void and of no effect and that the then members of the board of directors were not removed. There being no vacancies to fill, plaintiffs could not elect a new board of directors for the corporation.

[3] Under the assumption that only the pledgee or trustee could vote pledged shares, and to escape the conclusion that the motion to adjourn the meeting for two weeks had been carried, plaintiffs point to the fact that the stock of Ada Sharp and J. B. Parlier had been pledged to secure debts to the corporation. From this they argue that as that stock was not voted by C. A. Parlier in favor of the motion to adjourn, but by Ada Sharp and J. B. Parlier, the motion to adjourn was not carried. There is no merit in this argument. The stock stood in the names of Ada Sharp and J. B. Parlier on the books of the corporation. No certificates for it had been issued to C. A. Parlier. Under the clear provisions of the code the shareholders of record had the right to vote that stock.

[4] Plaintiffs point to the rule prevailing in several states to the effect that when the stock of a shareholder is pledged to a corporation to secure the shareholder's debt to it, that stock then partakes of the nature of treasury stock and cannot be voted in a shareholders' meeting. They urge that under this rule the stock of C. A. Parlier, trustee, Ada Sharp and J. B. Parlier could not be counted in favor of the motion to adjourn and that therefore it was not carried by a majority vote of the shareholders.

In a case like this where the stock certificates had not been delivered into the actual possession of the corporation as pledgee, but to a trustee for the corporation, and where the certificates for the shares were issued to individuals and not the corporation, this rule invoked by plaintiffs cannot prevail here because of the clear provisions of our statutes.

[5, 6] A pledge is a deposit of personal property with another to secure the performance of some act by the pledgor. Section 2986, Civ.Code. It merely creates a lien on the pledged property that can only ripen into title by a foreclosure of the pledge. While the pledgee has legal possession of the pledged property, the vesting of the entire legal title in him does not follow from the pledge. (21 Cal.Jur. 328.) Therefore, as no certificate for the shares had been issued to the corporation, title to this pledged stock was not vested in the I. N. Parlier Estate Company by the pledge and it was not owner of the stock at the time of the meeting on October 15, 1938.

[7-9] "Corporations are, of course, creatures of statute and subject to legislative control. The legislature may exercise all legislative powers not denied to it by the State Constitution or not inconsistent with the state or Federal Constitution." Kaysser v. McNaughton, 6 Cal.2d 248, 57 P.2d 927, 929. Section 320b of the Civil Code gives to any trustee, pledge holder or trustee, in whose names shares stand on the books of the corporation, the right to vote such shares. There is no distinction made in the section between different classes of pledgees and trustees and their rights to vote pledged stock. As these provisions of the section are clear and unambiguous it is our duty to assume the legislature meant just what its language implies (People v. Stanley, 193 Cal. 428, 225 P. 1) and that it intended to give all pledgees and trustees and other persons having shares standing in their names as such, the right to vote such shares.

The right of the proxies to vote the stock standing in the name of National Bankitaly Company is argued at considerable length by counsel. The National Bankitaly Company had been merged into the Corporation of America and a proxy was presented, signed by that corporation. While the conclusion already reached makes a decision of this question unnecessary, we desire to call counsel's attention to Estate of Barreiro, 125 Cal.App. 153, 13 P.2d 1017, where a merger of corporations is considered at length. Further, many of the arguments presented under this topic are applicable to stock standing in the name of Carrie A. Thomas. The proxy to vote this stock was signed "Carrie A. Proctor".

Our conclusion that the old board of directors was not removed and that Lula G. Lawrence, G. W. Parlier and E. B. Campbell were not legally elected directors of the I. N. Parlier Estate Company makes it unnecessary for us to consider the remaining question argued, namely, the sufficiency of the call for and notice of the meeting to permit the question of the removal of the directors to be considered at such meeting.

The judgment is reversed with directions to the trial court to modify its findings and conclusions of law in accordance with the views herein expressed and to enter judgment for defendants.

We concur: BARNARD, P. J.; GRIFFIN, J.

---

33 Cal.App.2d 710

## CLEAR LAKE WATER CO. v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.

Civ. 6209.

District Court of Appeal, Third District, California.

July 20, 1939.

**1. Injunction 🔑230(2)**

Affidavits setting forth a decree forbidding water company to maintain lake above certain level, and alleging that company had it within its power to reduce level of water in lake as required by decree, but that it failed to do so, were sufficient to show that company committed contempt, and to confer jurisdiction on court of contempt proceedings. Code Civ.Proc. § 1209, subd. 5.

**2. Contempt 🔑54(4)**

In contempt proceedings for violation of a decree, affidavits setting forth terms of decree relied on, defendants' knowledge of such terms, and violation of the decree, are sufficient to confer jurisdiction on court. Code Civ.Proc. § 1209, subd. 5.

**3. Injunction 🔑230(3)**

In contempt proceeding against water company, wherein affidavits presented set forth a decree forbidding water company to maintain lake above certain level, and alleged that company had it within its power to reduce level of water in lake as required by decree, but failed or refused to do so, motion to dismiss for failure of proof was properly denied. Code Civ.Proc. § 1209, subd. 5.

**4. Contempt 🔑66(7)**

In proceeding to review an order finding water company guilty of contempt for violation of decree forbidding company to maintain lake above certain level, it was not within province of District Court of Appeal to establish any other or different variations in water level, or to provide for any greater emergency than that contemplated by the decree, where trial court had fixed a just, equitable, and complete rule of operation for all concerned. Code Civ. Proc. § 1209, subd. 5.

**5. Injunction 🔑225**

A violation of decree forbidding water company to maintain lake above certain level could not be justified in contempt proceeding by the fact that there had been an unusual rainfall over a period of more than three weeks, where company had permitted lake to rise to maximum level before opening water gates. Code Civ.Proc. § 1209, subd. 5.

**6. Contempt 🔑54(4)**

Trial court's jurisdiction to pass on question whether there has been a contempt must be measured by sufficiency of the affidavits. Code Civ.Proc. § 1209, subd. 5.

**7. Contempt 🔑54(4)**

Even if affidavits in a contempt proceeding are inartificially drawn or the facts alleged make only a slight substantive statement of the offense, the affidavits are sufficient. Code Civ.Proc. § 1209, subd. 5.

**8. Contempt 🔑63(1)**

Mere irregularity in the procedure in a contempt proceeding does not affect the court's jurisdiction, and a judgment rendered therein is valid, regardless of such irregularity. Code Civ.Proc. § 1209, subd. 5.

**9. Injunction 🔑226**

The fact that water company may have been actuated by good intentions in violating decree forbidding it to maintain lake above certain level was no defense to contempt proceeding, though it may have entitled company to have punishment mitigated. Code Civ.Proc. § 1209, subd. 5.

◆

Proceeding by the Clear Lake Water Company against the Superior Court of the State of California, in and for the

County of Mendocino, W. D. Held, Judge thereof, Percy S. King, Judge of the Superior Court of the State of California and for the County of Napa, and pro tempore judge of the Superior Court of the State of California, in and for the county of Mendocino, and H. M. Burke, Clerk of the Superior Court of the State of California, in and for the County of Mendocino, to review an order adjudging the petitioner in contempt of court.

Affirmed.

Neal Chalmers, of Woodland, for petitioner.

Burt W. Busch, Dist. Atty., of Lakeport, and Huston, Huston & Huston, of Woodland, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In an action entitled, "M. M. Gopcevic et al. v. Yolo Water & Power Co., a corporation, et al., defendants, and County of Lake et al., interveners", an order was made, adjudging Clear Lake Water Company, a corporation, in contempt of court, and sentencing said corporation to pay a fine of $500. This proceeding is for a review of that order.

Clear lake is a body of water situated wholly within Lake county, with a surface of approximately 40,000 acres. The lake is fed by seasonal rains and the level is variable, depending upon the rainfall and evaporation.

Some time prior to 1920 the Yolo Water & Power Company, predecessor in interest of the petitioner herein, was organized to divert the surplus waters of Clear lake to the farming lands lying below the lake in Yolo and Lake counties. The only outlet to Clear lake is through the channels of Cache creek, which flows easterly through Yolo and Lake counties, and finally terminates in a tule basin in the Yolo by-pass, some seventy-five miles from its source.

To control the wasting of the spring and winter rainfall in the Clear lake basin, the Yolo Water & Power Company constructed a dam across Cache creek about five miles down stream from the lake. This dam is equipped with fifteen gates, by means of which the flow of water out of Clear lake and into Cache creek is regulated. At the lower rim of the lake is a stratum of rock known as the Grigsby riffle, over which the waters flow into Cache creek, and which impedes the run-off from the lake. The water company, in 1920, was contemplating the cutting of the Grigsby riffle, thereby deepening the outlet channel of the lake, when a proceeding entitled "M. M. Gopcevic et al. v. Yolo Water & Power Company et al., defendants, and County of Lake et al., interveners", was commenced to enjoin the cutting of this barrier. In that proceeding a stipulation was entered into between the parties thereto, and a decree was signed, referred to herein as the "Gopcevic Decree", which, after permanently enjoining the Yolo Water & Power Company from excavating or deepening the outlet of Clear lake, further provided: "That the agents, servants, employees, successors and assigns of the said defendants, and the said defendants, and each of them, and all persons acting under or in aid of them, or either of them, be perpetually enjoined and restrained from at any time or in any way raising the level of said lake in excess of 7.56 feet above zero on said Rumsey Gauge, and from at any time or in any way lowering the level of said lake below zero on said Rumsey Gauge; provided, however, that the rise of said Clear Lake, by reason of storm or flood conditions beyond the control of said defendants, or either of them, to a level in excess of 7.56 feet above zero on said Rumsey Gauge, but in no event to a level in excess of 9.00 feet above zero on said Rumsey Gauge, for any period not exceeding ten successive days, shall not be deemed a violation hereof."

In 1927, by mesne conveyances, the Clear Lake Water Company, a corporation, petitioner herein, became the successor in interest of all the rights and properties of the Yolo Water & Power Company, and still is the owner thereof.

Early in February, 1936, it began to rain, and continuing almost steadily for the next three weeks with a total of 10.17 inches of rainfall in the Clear lake watershed, and on February 21, 1936, and continuing for some sixteen days thereafter, the established gauge showed that the level of the lake was in excess of 7.56 feet above zero. The records show that the average annual rainfall in the Clear lake watershed for the past fifty years is 23.16 inches at Lakeport, 28.50 inches at North Lakeport, and 26.80 inches at Upper Lake, indicating that a fall in excess of ten inches in less than a month was probably an unusual occurrence.

Owing to the barrier known as the "Grigsby Riffle", the outlet channel which controls the amount of water passing through the dam had a capacity of but 2600 cubic feet per second. It is therefore obvious that if the level of the lake was to be regulated by the gates in the dam, the operators thereof must anticipate to a certain extent the rainfall and run-off, and open the gates early enough so that the lake would still remain below the prescribed maximum.

From data introduced in evidence we have before us the rainfall during the period in question, the levels of the lake, and the time of the opening of the gates in the dam, as follows:

Petitioner claims that the court erred in various particulars in adjudging it guilty of contempt for violation of certain of the provisions of the "Gopcevic Decree".

[1-3] The first point urged is that the court should have sustained petitioner's demurrer, and granted its motion to quash the contempt proceedings. This contention is based upon the claim that the affidavits presented to the trial court did not state facts sufficient to show that the defendant, Clear Lake Water Company, committed any act constituting a contempt, and that the affidavits were not sufficient to give the court jurisdiction to proceed, in that the affidavits did not charge petitioner with a violation of the "Gopcevic Decree", as there was no allegation that petitioner rais-

| *Date.* | *Hour.* | *Level of Lake.* | *Rainfall.* | |
|---|---|---|---|---|
| Jan. 1, 1936 | 12 N. | 2.95 | | |
| " 15 " | 12 N. | 4.35 | | |
| Feb. 1 " | 12 N. | 5.38 | .45 | Feb. 2nd to |
| " 11 " | | | .84 | Feb. 14th. |
| " 12 " | | | 1.95 | Gates at dam |
| " 13 " | | | .92 | closed. |
| " 14 " | | 6.47 | .42 | 11:50 A.M. |
| " 14 " | | | | 13 gates partially open. |
| " 15 " | 12 N. | 6.65 | | 13 gates partially open. |
| " 16 " | 12 N. | 6.90 | .75 | 15 gates open to capacity. |
| " 17 " | | 7.00 | .19 | |
| " 18 " | | 7.20 | 1.32 | |
| " 19 " | | 7.32 | .10 | Feb. 16th to March 7th, |
| " 20 " | | 7.33 | .16 | all gates wide open. |
| " 21 " | 12:30 P.M. | 7.45 | | |
| " 21 " | 5:00 P.M. | 7.55 | .85 | |
| " 21 " | 6:00 P.M. | 7.58 | | |
| " 22 " | | 7.76 | 1.21 | |
| " 23 " | | 7.88 | .35 | |
| " 24 " | | 8.00 | .15 | |
| " 25 " | | 8.17 | .50 | |
| " 26 " | 8:30 A.M. | 8.22 | | |
| " 26 " | 12:30 P.M. | 8.24 | | |
| " 27 " | | 8.23 | | |
| " 28 " | | 8.20 | | |
| " 28 " | | 8.18 | | |
| " 29 " | | 8.14 | | |
| Mar. 1 " | | 8.07 | | |
| " 2 " | | 8.00 | | |
| " 2 " | | 7.98 | | |
| " 3 " | | 7.93 | | |
| " 4 " | | 7.88 | | |
| " 5 " | | 7.79 | | |
| " 6 " | | 7.66 | | |
| " 7 " | | 7.60 | | |

ed the level of Clear lake above the elevation of 7.56, nor caused the level of the lake to remain above that maximum for more than ten days, nor that the petitioner, having it within its power to reduce the level of the water in Clear lake, failed or refused to do so. This contention, however, cannot be taken seriously. The affidavits show that petitioner could control the level of the lake by the timely operation of its gates. It had control of the dam and when and to what extent the gates should be opened, which we think sufficiently shows the control of petitioner over the outlet. The affidavit set forth the particular terms of the decree relied upon, the knowledge of such terms by the Clear Lake Water Company, and the violation of the decree. No further averments seem to be necessary. In re Foss, 123 Cal.App. 542, 544, 11 P.2d 676. After the demurrer and motion to quash were denied, the company answered, and evidence similar to that set forth in the affidavits was received. Petitioner then moved to dismiss for failure of proof, but that motion was likewise properly denied.

The purpose of the construction of the dam and the impounding of the flood waters of Clear lake was to provide water for irrigation purposes during the summer months. In order to protect the property owners around the borders of the lake, the fixing of the maximum and minimum levels was established, and also certain restrictions, not here important, as to the rapidity with which the level of the lake could be reduced.

When petitioner and its predecessor undertook to control the level of the waters of Clear lake, they undoubtedly realized that they were dealing with a dangerous and uncertain element. The court, in establishing the range within which the level of the lake should be maintained, also had such uncertainty in mind when it provided that if by reason of storm or flood conditions beyond the control of the defendants, the level of the lake might reach to a point of 9 above zero, but not for a period in excess of ten successive days, this would not be deemed a violation of the decree. This provision clearly was inserted to provide for such emergency.

[4] It would therefore appear that it is not within the province of this court to establish any other or different variations, nor to provide for any greater emergency than that contemplated by the decree, for the trial court, having the parties before it, fixed a just, equitable and complete rule of operation for all concerned. The decree imposes upon petitioner the duty of operating the dam, and in anticipation of storm and flood conditions, it must open the gates of the dam in such time that a withdrawal of the water will reduce the level of the lake and take care of the anticipated storms and the consequent run-off within the prescribed times.

An examination of the schedule of the lake levels indicates that not only did the company take the ten days provided in the decree but also took an additional eight or nine days in which to draw down the level of the lake to the specified point of 7.56 feet. The trial court, in fixing this level, undoubtedly had in mind the fact that the water company derived a revenue from the sale of waters to the farmers along its distributing system, and also had in mind that bordering the lake there were farms, summer resorts and homes which demanded protection, and their owners definitely assured of a fixed water level. Neither side should be compelled or permitted to speculate on weather conditions nor to ask a reviewing court for a modification of terms. Apparently the maximum was fixed at 9 feet above zero, believing that such maximum elevation would take care of all contingencies. The purpose of the decree was to establish and fix a definite and constant condition on the lake from year to year.

[5] Petitioner does not deny the violation of the decree, but seeks to justify this violation by the claim that the unusual rainfall over the period of more than three weeks in February and March was something beyond its control. When the dam was erected and the decree was established, petitioner accepted all of the responsibilities that went with the act. The control of the gates and the level of the lake were in its keeping, subject to the limitations fixed by the court, and it cannot accept the benefits of control without assuming the responsibilities incident thereto. Petitioner cannot permit the lake to rise to the specified level and then open the gates, claiming it had thereby done all that it is called upon to do to comply with the decree of the court.

[6, 7] Petitioner here attacks the jurisdiction of the court, and while the jurisdiction of the trial court to pass upon this matter must be measured by the sufficiency of the affidavits, such affidavits are sufficient to confer jurisdiction, unless they totally fail to charge a violation of the decree. In re Wood, 194 Cal. 49, 227 P. 908. As said in In re Foss, supra, even if the affidavits were "inartificially drawn" or the facts alleged merely "squinted" at a substantive statement of the offense, it would be sufficient.

[8] Mere irregularity in the procedure does not affect jurisdiction, and a judgment rendered therein is valid regardless of such irregularity. In re Selowsky, 189 Cal. 331, 334, 208 P. 99.

[9] It may have been, and undoubtedly was the intention of petitioner to so operate its dam as to inflict no damage upon property owners about the lake, but good intentions are no defense, which showing could have been, and undoubtedly was, considered by the trial court in mitigation of the punishment.

In McFarland v. Superior Court, 194 Cal. 407, 228 P. 1033, 1039, it appeared that respondent had been diligent in stopping pumping operations on the date specified, but the court, considering that point, said: "Section 1209, subdivision 5, Code of Civil Procedure, provides that disobedience of any lawful judgment, order, or process of a court is a contempt, and therefore diligence is not material as to the fact of disobedience."

In one of the affidavits, however, it is alleged that while operating its water system petitioners did "wilfully permit" the level of the lake to remain above 7.56 for a period longer than that prescribed by the decree.

These affidavits clearly show the decree of the court and its violation. This is sufficient to confer jurisdiction upon the court. Other points are presented, but we believe that what has been said is sufficient to justify the order of the court, and the petitioner has no cause to complain.

The judgment and order are affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

---

34 Cal.App.2d 14

## MORGAN v. BROTHERS OF THE CHRISTIAN SCHOOLS et al.

Civ. 10773.

District Court of Appeal, First District, Division 1, California.

July 27, 1939.

1. **Appeal and error 🔑957(1)**
**Judgment 🔑139**

A motion to set aside a default judgment is addressed to sound discretion of trial court, and, in absence of a clear showing of abuse in exercise of such discretion, a reviewing court will not disturb the trial court's ruling on the motion. Code Civ. Proc. § 473.

2. **Appeal and error 🔑957(1)**

On appeal, reviewing courts are more disposed to affirm an order setting aside a default judgment when result is to compel a trial on merits, than when default judgment is allowed to stand and it appears that a substantial defense could be made, since policy of law favors, whenever possible, a hearing on the merits. Code Civ. Proc. § 473.

3. **Judgment 🔑143(6)**

In action to recover money under oral contract of employment, trial court did not abuse discretion in setting aside a default judgment against one defendant, where complaint did not allege that such defendant took part in making of alleged contract and defendant's failure to appear within 10-day period was due to fact that his attorney in good faith mistakenly believed that summons had been served outside county in which action was instituted. Code Civ.Proc. § 473.

4. **Judgment 🔑138(1)**

That allegations of complaint seemed to show that a defendant was brought into case merely as nominal party, and that at least one defendant was served with summons outside of county within which action was instituted, plus fact that an application by such defendant to vacate default judgment against him was made with reasonable promptness, could be taken as proof that ruling of trial court setting aside default did not delay trial of action or prejudice plaintiff in maintaining action against real parties in interest. Code Civ.Proc. § 473.

**5. Appeal and error ⚷1024(4)**

The trial court's determination of matters in connection with the setting aside of a default judgment would be conclusive on appeal where inferences on such matters were merely conflicting.

**6. Judgment ⚷158**

That defendant did not file an affidavit in support of a motion to set aside a default judgment against him did not render improper the trial court's ruling setting aside the default. Code Civ.Proc. § 473.

**7. Judgment ⚷143(10)**

In the determination of motions to set aside default judgments, mistakes of attorneys and those of parties to the action are measured by the same rules. Code Civ. Proc. § 473.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Lawrence J. Morgan against the Brothers of the Christian Schools, etc., and Joseph King, also known as Brother Augustine, to recover a sum of money claimed to be due under an alleged oral contract of employment. From an order setting aside a default judgment against one of the defendants, plaintiff appeals.

Order affirmed.

Abraham Setzer, of San Francisco, for appellant.

Leo A. Cunningham, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff brought this action to recover a sum of money claimed to be due under an alleged oral contract of employment. One of the several defendants sued failed to appear within the ten-day period allowed by law; the next day his default was taken, and several days later formal judgment was entered against him for the full amount prayed for in the complaint. Thereafter, pursuant to a motion made under the authority of section 473 of the Code of Civil Procedure, the default judgment was set aside, and from the order made in that behalf plaintiff took this appeal.

[1, 2] With respect to the law governing appeals of this kind, the authorities hold uniformly that a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and that in the absence of a clear showing of abuse in the exercise of such discretion a reviewing court will not disturb the trial court's ruling. Moreover, it is the declared policy of the law to favor, whenever possible, a hearing on the merits, and therefore reviewing courts are much more disposed to affirm an order when the result is to compel a trial on the merits, than when the default judgment is allowed to stand and it appears that a substantial defense could be made. Waybright v. Anderson, 200 Cal. 374, 253 P. 148. An examination of the record in the present case discloses no ground upon which to base the conclusion that the trial court's ruling constitutes an abuse of discretion.

The action was instituted in Alameda county, and is based on allegations to the effect that for many years appellant was employed by the Brothers of the Christian Schools, a corporation, known also as the Christian Brothers, as caretaker and janitor of St. Mary's College High School, Peralta Park, Berkeley; and that during those years of employment he allowed his wages to accumulate and remain in trust with Brother George, a member of the Christian Brothers, who died some time prior to the commencement of this action, with the understanding that the same would be paid to him on demand. Joined with the Brothers of the Christian Schools, as parties defendant, were three of its officers, including the respondent, Joseph King, whose religious name is Brother Augustine, several allied religious corporations, St. Mary's College of Oakland, a corporation, and certain fictitious parties. The complaint contains no allegations that respondent took any part in any of the transactions attending the making of the alleged oral contract of employment; but at the time of the commencement of the action he was one of the directors and the superintendent of St. Mary's College High School, and it appears from the allegations of the complaint that it was because of such official connection with the institution that he was made a party defendant. The summons was served on him at the high school on June first; and according to the evidence adduced at the hearing his failure to appear in the action within the statutory period was due to the fact that his attorney, whose offices were in San Francisco, was advised that said high school where said summons was served was located in Contra Costa county; whereas the fact is it is situate in Alameda county, not far distant from, that is, within a mile of the boundary line between the two counties. In this connection it appears from the averments of the affidavit filed by said attorney in support of the motion that the copies of the summons and complaint which were served on respondent were delivered to him at his office in San Francisco by Brother Velessian (a member of the Christian Brothers but not a party to the action), with the request that he represent respondent and certain other defendants; that at the time he was appointed to represent defendants he was advised that the documents mentioned had been served on respondent at the high school and that the high school was located within the boundaries of Contra Costa county and not within Alameda county; that consequently he assumed he had thirty days from the date of the service within which to file an appearance in behalf of respondent. In addition to the facts set forth in said affidavit and in confirmation of the averments therein that said attorney was acting under the erroneous belief that said summons was served in Contra Costa county, the record shows that on June third, which was only two days after the service of the summons, and more than a week prior to the last day to file an appearance, he wrote a letter to counsel for appellant, whose offices were also in San Francisco, in which he stated: "* * * I notice that you filed the same (referring to said action) in Alameda county on May 28th and served Brother Augustine at St. Mary's College High School, Peralta Park, Berkeley. The purpose of my letter is to advise you that personal service so made was made in Contra Costa county. The Berkeley school is located across the Alameda county line, and is situated within Contra Costa county. In so advising you of this fact, it will prevent your taking a default prematurely since we will exercise the use of the thirty days for appearance, as the service was made out of Alameda county. You, of course, will verify this fact." Continuing, he went on to say that inasmuch as the action had been brought in the wrong county, it might be more convenient to try the case in San Francisco; "but in any event the proper county is Contra Costa county", and that unless it was agreed that the cause would be tried in San Francisco respondent would move to change the place of trial to Contra Costa county. On the following day counsel for appellant acknowledged receipt of the letter but made no comment whatever in response to the assertion made therein that the high school was in Contra Costa county. He merely stated in somewhat curt terms that the action would not be tried in San Francisco. Thereupon respondent's attorney again wrote counsel for appellant under date of June eighth, which, as will be noted, was still three days prior to the expiration of the ten-day period within which he might have filed an appearance or obtained an extension of time so to do, in which he stated, among other things, "The only motive of my letter of June 3rd to you was to courteously advise you of a definite fact concerning which, if you are unaware of it, might cause you to go to considerable trouble and expense in taking a default, prematurely." The evidence also shows that service of summons on St. Mary's College of Oakland, one of the defendants sued, was in fact made in Contra Costa county.

[3] As will be seen from the foregoing, there is ample evidence apart from the averments in said attorney's affidavit to support the trial court's conclusion that the failure to appear in the action within the statutory period of ten days was not the result of negligence, but was due entirely to the mistaken belief that the summons was served outside of the county in which the action was instituted. The factual situation upon which the motion to set aside the default was based is therefore no different from the one presented in O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St.Rep. 105, (cited with approval in Waybright v. Anderson, supra), wherein the trial court's order setting aside the default judgment was readily affirmed.

[4] In further support of the trial court's ruling, it may be stated that it appears from respondent's proposed answer to the complaint that he is claiming in good faith to have a substantial defense to the action; in fact, the allegations of the complaint themselves would seem to show that he was brought into the case merely as a nominal party; and the fact that at least one of the defendants was served with summons outside of the county within which the action was instituted, and the further fact that the application to vacate the default was made with reasonable promptness, may be taken as proof that the ruling complained of did not have the effect of delaying the trial of the action, nor in any way operate to appellant's prejudice in maintaining his action against the real parties in interest.

[5-7] Appellant calls attention to certain circumstances which he claims tend to show that said attorney knew of the true location of the high school. But even assuming that such inference could be reasonably drawn therefrom, a mere conflict, at best, would be raised thereby, and therefore in any event the trial court's determination of the matter would be conclusive on appeal. Nor is the situation altered by the fact that respondent himself filed no affidavit in support of the motion. As shown by the numerous cases cited in respondent's brief, in the determination of motions to set aside defaults, mistakes of attorneys and those of parties to the action are measured by the same rules; and here, as in the case of O'Brien v. Leach, supra, we are dealing with the mistake of the attorney, and not of the client. With respect to the cases cited by appellant, it will suffice to say that after having examined them we find nothing therein at variance with the legal principles above stated, nor is there such similarity of facts as to make the decisions therein controlling on this appeal.

The order is affirmed.

We concur: PETERS, P. J.; WARD, J.

---

34 Cal.App.2d 46

## FRITSCHE et al. v. McCUE.

Civ. 12238.

District Court of Appeal, Second District, Division 1, California.

July 31, 1939.

**1. Appeal and error 🔑800**

Motion to dismiss appeal for failure to file transcript in time was denied, where transcript was filed before motion came on for hearing. Rules of the District Courts of Appeal, rule 5.

**2. Appeal and error 🔑518(1, 3)**

Where appeal was from the whole of the trial court's judgment, which was a judgment on the issues raised by both the complaint and the cross-complaint, demurrer to complaint and answer to cross-complaint were proper parts of the judgment roll.

**3. Appeal and error 🔑653(1)**

In absence of statute to the contrary, an appellate court has power to order and cause the correction of the record before it at all times during the pendency of an appeal, irrespective of statute relating to amendment of pleadings. Code Civ.Proc. § 473.

**4. Appeal and error 🔑654**

Where omission of demurrer to complaint and answer to cross-complaint from the judgment roll appeared to have been inadvertent, the District Court of Appeal would, in exercise of its discretion, grant appellant's request to file duly authenticated copies of the omitted documents as part of the transcript on appeal.

**5. Appeal and error 🔑654**

The District Court of Appeal should be liberal in granting amendments to record on appeal, in order to permit the addition of omitted documents, where the amendments can cause the respondents no injustice, and will secure to the appellants a hearing on the merits.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Mary Alice Fritche and George P. Adams against Thomas F. McCue, wherein the defendant filed a cross-complaint. From an adverse judgment, the defendant appeals, the plaintiffs move to dismiss the appeal, and the defendant moves to amend the record.

Plaintiffs' motion denied, and defendant's motion granted.

Thomas F. McCue, of Los Angeles, in pro. per.

G. P. Adams and Charles E. Beardsley, both of Los Angeles, for respondents.

WHITE, Justice.

This is a motion to dismiss the appeal on the ground that no transcript on appeal was filed within the requisite time. It appears that judgment was entered September 21, 1938; that notice of the entry thereof was given the day following; that notice of intention to move for a new trial was filed within time and on October 3, 1938; that said motion for new trial was denied November 22, 1938. Notice of appeal to this court was appropriately served and filed December 7, 1938. The engrossed bill of exceptions was signed, settled and filed in the office of the county clerk on February 8, 1939. On March 27, 1939, respondents served and filed a notice of motion to dismiss the appeal and the same came on for hearing on the 24th of April, 1939. In the meantime, and on April 20, 1939, the transcript on appeal was lodged in this court.

[1, 2] The transcript on appeal having been filed prior to the time that the motion came on for hearing, and that being sufficient answer to the motion (rule V; Snodgrass v. Hand, 125 Cal.App. 265, 13 P.2d 769), the real ground of the motion now is that the transcript on appeal, as filed, is not in fact what it purports to be, in that the demurrer to the complaint and the answer to the cross-complaint are not included in the judgment roll. The appeal being from the whole of the judgment rendered in the trial court, which is a judgment upon the issues raised by both the complaint and the cross-complaint, both the missing pleadings are proper parts of the judgment roll. Appellant, however, presents to us a motion by which we are asked to grant a diminution of the record by permitting appellant to add to the same as part of the transcript on appeal duly authenticated copies of the demurrer and the answer to the cross-complaint, together with a certificate of the county clerk that such documents, together with that portion of the judgment roll now included in the transcript on appeal heretofore filed, constitute the judgment roll in its entirety.

[3] In the exercise of its jurisdiction an appellate court has power, in the absence of statutory mandate or authoritative expression to the contrary (and in this state there is none), to order and cause the correction of a record before it at all times during the pendency of an appeal; and this without regard to the terms of section 473 of the Code of Civil Procedure. Dugan v. Forster, 101 Cal. App. 144, 281 P. 411.

[4, 5] By reason of the fact that the omission of the demurrer and the answer to the cross-complaint appears to have been inadvertent, we deem it a proper exercise of our discretion to grant appellant's request to file duly authenticated copies of the documents in question as part of the transcript on appeal. The court should be liberal in granting amendments which can cause the respondents no injustice and which will secure to the appellant a hearing on the merits.

Respondents' motion to dismiss the appeal is denied and appellant's motion to amend the record is granted; the latter to have ten days from and after the filing of this decision within which to lodge the authenticated copies of the documents in question in this court and twenty days thereafter within which to file his opening brief.

We concur: YORK, P. J.; DORAN, J.

34 Cal.App.2d 7

## PEOPLE v. CROWNOVER.

Cr. 2050.

District Court of Appeal, First District,
Division 1, California.

July 24, 1939.

**1. Criminal law** ⚷421(3)

In cases of sex crimes committed on children, the age of the child may be established by the child's testimony. Pen.Code, § 288.

**2. Infants** ⚷20

In prosecution for violation of statute concerning crimes against children, testimony of complaining witness that he was 13 years old was sufficient to sustain jury's implied finding on issue of the witness' age, notwithstanding an alleged subsequent contradictory statement by witness, especially where record did not show that during trial defendant had claimed that witness was over statutory age. Pen.Code, § 288.

**3. Criminal law** ⚷1159(3)

The general rule governing reviewing courts in dealing with appeals involving a conflict of testimony applies with the same force to cases where the conflict arises from the testimony of one witness as it does to cases where conflict arises from testimony of witnesses on opposing sides.

**4. Infants** ⚷20

Where, in prosecution for violation of statute concerning crimes against children, jury in exercise of their province as judges of testimony and of weight to be given thereto, accepted as true the complaining witness' testimony that he was 13 years old, the jury's decision on such question was controlling on appeal. Pen.Code, § 288.

**5. Criminal law** ⚷1111(1)

In deciding an appeal, the reviewing court cannot go behind the testimony as it appears in the certified transcript.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Alfred Dwight Crownover was convicted of a violation of the Penal Code, § 288, and he appeals.

Affirmed.

Francis C. Mackall, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The defendant was found guilty by a jury of violating section 288 of the Penal Code; and he has appealed from the judgment of conviction.

The lewd and lascivious acts charged were committed in San Francisco on a boy whose home was in Portland, Oregon. He had wandered to San Francisco in company with an older brother and another boy, and shortly after his arrival, while alone on the street, was accosted by the defendant, and several days later induced to make his home with defendant at his living quarters in a rooming house on Sixth street. About a month later, while they were so living together, they were taken into custody by the police. In addition to the accusatory testimony given by the boy, the officer making the arrest testified that at the time thereof defendant confessed he had been carrying on degenerate practices with the boy.

There is no complaint made that the defendant was not given a fair trial, nor is it claimed that the jury was not justified in finding from the evidence that he committed the lewd and lascivious acts charged against him. As sole ground for reversal it is contended that "there is no evidence that the complaining witness was under the age of fourteen years at the time of the alleged crime." There is no merit in the point.

[1-4] In cases of sex crimes committed on children, the age of the child may be established by the child's own testimony (22 Cal.Jur. 381); and here the boy, after being sworn as a witness, was interrogated as to his age, schooling, and understanding of the nature of the oath he had taken to tell the truth; and in response to the question "How old are you", he replied, "I am thirteen years old. I will be fourteen October 18th". The testimony so given by him is therefore legally sufficient to sustain the jury's implied finding on this issue. Later on, according to the reporter's transcript, in answer to a question asked on cross examination, he is purported to have given the date of his birth as "the 24th, the 24th of October, 1918". But this single answer does not serve as ground for reversal. At most it merely conflicted with the boy's previous statement as to his age; and it is well settled that the general rule governing reviewing courts in dealing with appeals involving a conflict of testimony applies with the same force to cases where the conflict arises from the testimony of one witness as it does to cases where the conflict arises from the testimony of witnesses on opposing sides. Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866, citing earlier cases; People v. Crawford, 24 Cal.App. 396, 141 P. 824; Pedrow v. Federoff, 77 Cal.App. 164, 247 P. 212; Bushey v. Union Oil Co., 13 Cal.App.2d 350, 56 P.2d 1272; 2 Cal.Jur. 930. Therefore, since the members of the jury in the present case, in the exercise of their province as sole and exclusive judges of the testimony, and of the weight to be given thereto, accepted as true and correct the boy's previous positive statement that he was then thirteen years old, their decision in the matter is controlling on appeal.

In this connection it may be stated that the jury in resolving the conflict evidently concluded that the boy, in attempting on cross examination to fix the year of his birth, became confused; and a reading of the entire record would seem to show that the court and the attorneys on both sides took the same view, because no further questions as to the boy's age were propounded by anyone, nor so far as the record shows did the defendant at any time during the trial make the claim that the boy was over the statutory age. Moreover, it is quite certain that if in fact he was nearly twenty years old as his answer on cross examination would indicate, the point as to his age would have been made the basis of a motion for a new trial; whereas no motion for new trial was made, nor in presenting the appeal has defendant anywhere asserted the truth to be that the boy was in fact upwards of nineteen years of age at the time the offense is alleged to have been committed, and therefore that the verdict has resulted in a miscarriage of justice.

[5] In further support of the conviction the attorney-general advances the argument that the answer the boy is purported to have given in fixing the date of his birth, as it appears in the transcript, is doubtless a typographical error—that what he really said was that he was born in '24, on October 18th; and there are many reasons to justify the belief that he so stated. However, the law is firmly established that in deciding an appeal the reviewing court may not go behind the testimony as it appears in the certified transcript; and in considering the appeal herein we have adhered strictly to such rule.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

---

34 Cal.App.2d 19

## STEPHENSON v. UNEMPLOYMENT RESERVES COMMISSION OF CALIFORNIA et al.

Civ. 12275.

District Court of Appeal, Second District, Division 1, California.
July 27, 1939.

**1. Constitutional law** 🔑**12, 48**

Constitutional provisions and statutes must be construed with view of according effect to both, if possible.

**2. Officers** 🔑**9**

Statutes authorizing appointing power to reject any probationer during probationary period for reasons relating to probationer's qualifications or good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility, do not amount to an invasion of exclusive jurisdiction vested in state personnel board by constitution with regard to permanent appointment and promotion in state civil service. Gen.Laws 1937, Act 1404, §§ 122, 123; Const. art. 24, §§ 1, 2, 5(a).

**3. Officers** 🔑**69**

The rejecting of an employee by the State Unemployment Reserves Commission during probationary period did not amount to a "dismissal," "demotion," "suspension," or "punitive action" within constitutional provision vesting exclusive jurisdiction in regard to such matters in state personnel board, and hence action of personnel board in seeking to reinstate employee was without legal sanction. Gen.Laws 1937, Act 1404, §§ 122, 123; Const. art. 24, §§ 1, 2, 5(a).

[Ed. Note.—For other definitions of "Dismissal" and "Suspend; Suspension," see Words & Phrases.]

**4. Officers** 🔑**76**

Even if state personnel board had authority under Civil Service Act to conduct hearing following rejecting of employee by State Unemployment Reserves Commission during employee's probationary period, personnel board was not authorized to reinstate employee. Gen.Laws 1937, Act 1404, § 35.

◆

Original proceeding by Harry W. Stephenson against the Unemployment Reserves Commission of the State of California and others for a writ of mandate to compel petitioner's reinstatement to position of field supervisor and office manager, grade 2, in the Department of Employment, and salary payments subsequent to his dismissal.

Peremptory writ denied and alternative writ heretofore issued discharged.

Hanna & Morton and Thomas J. Cunningham, all of Los Angeles, for plaintiff.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for defendants.

DORAN, Justice.

"As a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions", and as well in an effort contemplated "to assist in protecting the public against the social effects of unemployment which may be created in future years", the legislature adopted "An Act to establish a system of unemployment reserves" for the state of California. Stats.1935, chap. 352, p. 1226.

The act provides that it "shall be administered by the Unemployment Reserves Commission of this State, to be appointed by the Governor, by and through the State Department of Employment which is hereby created and of which such commission shall be the governing body". Stats.1935, supra, p. 1241. By the terms of the act, "The State of California hereby accepts the provisions of the Wagner-Peyser Act, approved June 6, 1933, passed by the Congress of the United States, and entitled 'An act to provide for the establishment of a National employment system and for cooperation with the States in the promotion of such system, and for other purposes.'" Stats.1935, p. 1243. It further provides that: "The Division of State Employment Agencies in the Department of Employment shall be the agency of this State for the purposes of said act. Said division by and through its chief shall have full power to cooperate with all the authorities of the United States having powers and duties under said act of Congress and, with the approval of the commission, to do and perform all things necessary to secure to this State the benefits of that act of Congress in the promotion and maintenance of a system of public employment offices." Stats.1935, p. 1243. Thus the Unemployment Reserves Commission is the official agency of the state of California, through which and by means of which the state acts in connection with all details affecting the bargain for relief between the state of California and the United States. The act further provides that "The commission may employ such assistance as seems to it necessary for the administration of this act, subject to the provisions of the Civil Service laws," and further provides that the commission "Shall adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act." Stats. 1935, p. 1242.

On August 28, 1937, petitioner qualified by open competitive examinations conducted by the state personnel board for the positions of field supervisor and, also, manager, local employment office, grade 2, in the division of state employment agencies of the aforesaid Unemployment Reserves Commission, State of California. The positions of field supervisor, and manager, are of the same class and have substantially similar duties, responsibilities, qualifications and salary range.

On or about the 4th day of May, 1938, petitioner was appointed by the Unemployment Reserves Commission to the position of field supervisor, at a salary of $260 per month; petitioner entered upon the performance of his duties on that day. On June 1, 1938, petitioner was transferred by the Unemployment Reserves Commission to the position of manager, local employment office, grade 2, at the same salary as above stated.

Thereafter, namely on September 30, 1938, petitioner was personally served with a letter by the commission notifying him of his dismissal during his probationary period, which letter read as follows:

"September 29, 1938.

"Mr. Henry W. Stephenson,
"Department of Employment,
"San Bernardino, California.

"Dear Mr. Stephenson:

"This is notice to you of your separation during the probationary period in the Department of Employment.

"A review of the records on file in your case shows that duplicate claims were filed with the State of California and the County of San Bernardino covering identical services and expenditures for automobile mileage expense. For this and other reasons, it is determined that you have failed to demonstrate the required merit, efficiency, fitness and moral responsibility, and that the good of the service requires your saparation from the position which you have filled.

"In accordance with the requirements of Section 122 of the Civil Service Act, this is therefore notification to you of your separation during your probationary period as a field supervisor and manager, grade 2 in the Department of Employment, effective October 5, 1938.

"A copy of this letter will be filed immediately with the Personnel Board.

"Very truly yours,
"Department of Employment
"Carl L. Hyde, Executive Director
"By Arthur St. Clair,
"Personnel Director."

On or about the 7th day of October, 1938, petitioner filed with the state personnel board at Sacramento, an appeal from the aforesaid dismissal, which appeal was heard in Los Angeles on November 15, 1938, before the referee acting in behalf of the board. A purported decision was thereafter rendered in behalf of the board restoring petitioner to civil service status, using the same language contained in the letter of dismissal, namely, "Field Supervisor and Office Manager, Grade 2, Department of Employment". After objections to the referee's report were filed in behalf of the department of employment, the report was set for hearing and the matter was heard before the board at its meeting in Sacramento, on February 3, 1939. Oral arguments of counsel for both petitioner and the department of employment were heard, and the board thereafter reinstated the petitioner, the order for such reinstatement reading as follows: "* * * Harry W. Stephenson was not rejected by the appointing authority during the probationary period, for reasons relating to the probationary qualifications, or the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility, in accordance with the law, and that he is hereby *reinstated to his former position* of Field Supervisor and Office Manager, Grade 2, Department of Employment, State of California, as of October 5, 1938." (Italics added.)

The records of the state personnel board now show that petitioner is an employee of the state department of employment with permanent civil service status as manager, local employment office, grade 2.

After the decision by the board on February 3, 1939, petitioner reported for assignment and work, and for his salary from October 5, 1938, to February 3, 1939. The Unemployment Reserves Commission, however, refused to employ petitioner, and also refused to pay any back salary.

Petitioner seeks a writ of mandate to compel his reinstatement and salary payments subsequent to his dismissal.

The controversy results from a dispute as to the authority of two state agencies, viz., the state personnel board, and the Unemployment Reserves Commission.

With regard to the authority of the state personnel board, the Constitution provides in part as follows: "Permanent appointment and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." Art. XXIV, Constitution of California. A method is provided for the creation and selection of the state personnel board and an executive officer. The Constitution further provides that, "Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and *dismissals, demotions, suspensions* and other *punitive action* for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective." (Italics added.) The following provision is also contained therein: "Sec. 5. (a) The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation." Art. XXIV, supra.

Following the adoption of the foregoing constitutional provision in 1934, the legislature in 1937 enacted legislation relating to the state civil service, purporting, as the legislation declares, to facilitate the operation of article XXIV above mentioned. Sections 122 and 123 of such legislation (Act 1404, Deering's General Laws, 1937) are as follows:

"Sec. 122. Any probationer may be rejected by the appointing authority during the probationary period for reasons relating to the probationer's qualifications or the good of the service, or failure to demonstrate merit, efficiency, fitness and moral responsibility. Notice of such action accompanied by the statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection."

"Sec. 123. After investigation of the reasons for rejection of a probationer, the board may restore such rejected probationer to the eligible list for certification to any position within the class other than the position from which he was rejected."

It is urged by respondents that the state personnel board does not have the authority to reinstate a discharged probationer, and in that regard respondents contend that such board lacks jurisdictional power to restore the probationer to the position from which he was rejected, and is limited to his restoration to the proper eligible list; that if the board could inquire into the truthfulness of the specific reasons given for the rejection, and could after investigation order the rejected probationer restored to his position, the distinction between the rejection of a probationer and the dismissal of a permanent employee would be practically eliminated. In other words, it is respondents' contention that sections 122 and 123 are controlling.

Petitioner, however, maintains that the provisions of section 122 limit the dismissal of a probationer only for specified and limited reasons, and in a specific manner; that under section 35 of the Civil Service Act (Act 1404, supra), the state personnel board had the duty and necessarily the power: "To make investigations and hold hearings * * * upon the petition of an employee or a citizen, or upon its own motion, concerning the enforcement and effect of this act and to enforce the observance of the provisions * * * of this act and the rules and regulations made thereunder."

From the standpoint of petitioner it is argued that the provisions of article XXIV of the Constitution are controlling, and that sections 122 and 123, being in conflict therewith must yield, as unconstitutional, to the mandate of article XXIV.

With the exception of sections 122 and 123, above mentioned, no other rule or regulation appears to exist relating to the action taken by the Unemployment Reserves Commission. It should be noted in this connection that the action taken by the Unemployment Reserves Commission, affecting petitioner, appears to have been neither a "dismissal", "demotion", nor "suspension", nor could such action necessarily be regarded as "punitive". It is with respect to such last-mentioned specific conditions that the state personnel board, as contended by petitioner, claims the exclusive power to act.

[1,2] Giving consideration to the provisions of the Constitution and the code sections, and with the view of according effect to both, if possible, as elementary rules of construction require, it is reasonable and logical to conclude that there is no real conflict between the two. Sections 122 and 123 are clearly intended to "facilitate" the operation of article XXIV of the Constitution, and being in harmony therewith, cannot be successfully assailed as unconstitutional. The state personnel board is bound to abide by valid acts of the legislature. Confined to a subject to which article XXIV makes no mention, the provisions of sections 122 and 123 amount to no invasion of power vested in the state personnel board by such article.

[3] As heretofore stated in substance, in no sense could the effect of sections 122 and 123 be regarded as a "dismissal", "demotion", "suspension" or "punitive" action, matters with regard to which the state personnel board, by virtue of the Constitution, appears to have exclusive jurisdiction; hence the action of the state personnel board in reinstating or seeking to reinstate petitioner is without legal sanction.

[4] Conceding that the state personnel board has power to conduct hearings as provided by section 35 of the Civil Service Act, neither such section, nor any other to which attention has been directed, vests the personnel board with power to reinstate petitioner after such action as was taken by the Unemployment Reserves Commission during petitioner's probationary period.

Relying upon rule XXVI of the judicial council, it is further contended by respondents that the petition herein does not disclose the names of the real parties in interest, or whose interest would be directly affected by the proceeding, for which reason, it is argued, the petition is insufficient. In that connection it is pointed out by respondents that the Unemployment Reserves Commission is supported largely by the federal government; that the United States Social Security Board contributes over 90 per cent to the support of the Unemployment Reserves Commission; that the United States Employment Service contributes a small percentage, and that the state of California contributes only about 4 per cent. It is unnecessary to decide such issue; moreover, the issue as to the sufficiency of the service on the alleged necessary parties, and the issue as to the statute of limitations, as well as other issues raised by respondents, in view of the conclusions reached herein, require no consideration or determination.

For the reasons stated the peremptory writ is denied and the alternative writ heretofore issued is discharged.

We concur: YORK, P. J.; WHITE, J.

34 Cal.App.2d 10

**GOLDBERG et al. v. ENGELBERG et al.**

**Civ. 10801.**

District Court of Appeal, First District, Division 1, California.

July 24, 1939.

Rehearing Denied Aug. 23, 1939.

Hearing Denied Sept. 21, 1939.

**1. Fraud** 🔑58(3)

Proof of fraudulent intent is seldom obtainable except through inferences drawn from circumstances surrounding a transaction.

**2. Appeal and error** 🔑846(5)

In absence of findings of fact, any reasonable inference drawn may be considered to support the judgment.

**3. Execution** 🔑194(3)

In proceedings by judgment creditors wherein the interest of the judgment debtor in funds on deposit with a bank was levied upon under a writ of execution and a corporation organized by debtor filed a third-party claim asserting ownership of such funds, evidence showing that corporation was a family affair and that funds of debtor and corporation were intermingled and that debtor's personal obligations were paid by corporation and debtor's private funds deposited in corporation's bank account warranted conclusion that funds were property of judgment debtor and authorized judgment denying third-party claim. Code Civ.Proc. § 689.

**4. Corporations** 🔑1

A corporation will not be recognized as a separate legal entity when used as a channel for an illegitimate business purpose, and in such cases law and equity will, when necessary, protect rights of third parties.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding by Helen Goldberg and Hadassah Goldberg, a minor, by Helen Goldberg, her guardian ad litem, against L. E. Engelberg and another, wherein, after a judgment had been recovered by Helen Goldberg and Hadassah Goldberg, a minor, against L. E. Engelberg, pursuant to a writ of execution, a levy was made upon the interest of L. E. Engelberg in money on deposit with a bank and the Madrone Wine Company filed a third-party claim to the money in controversy. From a judgment for plaintiffs, the Madrone Wine Company appeals.

Affirmed.

Glickman & Glickman, of Oakland, for appellant.

Abraham Setzer, of San Francisco, for respondents.

WARD, Justice.

This is an appeal by the Madrone Wine Company from a judgment upon a third party claim and proceedings under section 689 of the Code of Civil Procedure.

Respondents, Helen Goldberg, and Hadassah Goldberg, a minor, recovered a judgment in the superior court against L. E. Engelberg, defendant herein. In connection with this judgment, pursuant to a writ of execution, a levy was made upon any right, title and interest of Engelberg in funds on deposit with the Anglo-California National Bank at Oakland, California, in the name of the Madrone Wine Company, a corporation, the signature card of which company permitted withdrawal of funds only upon the signature of L. E. Engelberg as general manager; later upon the signatures of L. E. Engelberg as manager, or S. Scheinberg, a daughter, as secretary-treasurer. The bank deposited $826.05, levied upon as above, with the sheriff, whereupon the Madrone Wine Company filed a third party claim to the exclusive ownership of, right to and possession of the money. After hearing under the provisions of the above section, judgment was rendered for plaintiffs and respondents.

The evidence introduced tended to show that prior to the incorporation of the Madrone Wine Company, Engelberg conducted a United States bonded storeroom, and in the same location carried on a wine business under the name of Madrone Products Supply Company. Upon incorporation of the wine business, both remained in the same location, the bonded storeroom remaining in Engelberg's name and paying no part of the rent. Later, upon changing location, a lease was taken in the name of Engelberg, with the corporation guaranteeing the payment of rentals. The evidence further showed that the stockholders and directors of the corporation consisted of Engelberg's sister, three daughters and a son-in-law; that the records of the corporation were kept informally and incompletely, and that the meetings were held in Engelberg's home; that the corporation never paid a dividend to the stockholders and that the compensation of Engelberg was computed at the end of each year by the directors upon the recommendation of Engelberg; that his personal obligations were paid by corporation checks, he having no account in his own name, and it was not denied that his personal funds were deposited to the corporation's account; that a copy of a corporate resolution, furnished the bank with the signature card for withdrawal of funds, authorized the bank to accept funds for deposit without inquiry as to their source or disposition, upon the signature of Engelberg; that shortly after the rendition of the judgment in Goldberg v. Engelberg, Engelberg deeded a ranch containing a United States bonded winery to his wife, the consideration being love and affection; that this property was later listed, however, in an application of the Madrone Wine Company to the commissioner of corporations for a permit to issue stock, as an asset of Engelberg's; that subsequently the wife deeded the property to the corporation upon a verbal promise of stock in the corporation, which stock, however, was never issued to her; that the wine labels used by the company bear the name of L. E. Engelberg as vintner, manufacturer and bottler.

Appellant concedes that the Madrone Wine Company is a "family" corporation, its policies and direction being entirely controlled by the judgment debtor Engelberg. It appears from the testimony of Engelberg's relatives that their purpose in investing in the corporation was to give him a "job". The president of the corporation, Engelberg's son-in-law, who, with his wife, owned a majority of the corporation's stock, testified that prior and subsequent to the incorporation of the wine company, he was frequently called upon to make loans of money to Engelberg. When asked why he purchased the original stock, he testified:

"A. The main reason is from time to time I had to more or less help my father-in-law financially because he was in a very embarrassed position financially. In fact I may say that at one time—.

"Q. No, just why did you buy the stock? A. Well, just so as to create a position for him more or less and to relieve me from the need of advancing from time to time certain sums of money."

Engelberg, however, before the incorporation of the wine company, had a position running the same business under a similar name.

The question to be decided is, was there identity and unity of ownership and interest between the corporation and Engelberg, or, to put the matter in another way, did Engelberg and his family act in good faith in the incorporation of Engelberg's wine business? If the trial court was justified in rendering a judgment upon the implied finding that there was a virtual identity and unity of ownership and interest between the Madrone Wine Company and Engelberg, then we conclude that the inference to be drawn from the intermingling of funds—the payment of Engelberg's personal obligations by the corporation, and the deposit of Engelberg's private funds in the Madrone Wine Company's bank account—is sufficient proof of an inequitable purpose.

[1-3] Proof of fraudulent intent is seldom obtainable except through inferences drawn from circumstances surrounding a transaction. Lannan v. Garrett, 23 Cal. App.2d 367, 73 P.2d 620, citing Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350. In the absence of findings of fact, any reasonable inference drawn may be considered to support the judgment. Crofts v. Nicolaides, 25 Cal.App.2d 474, 77 P.2d 882. A review of the evidence discloses reasonable inferences proving the ownership of the corporate assets by the judgment debtor. The facts are such that a recognition of separate corporate existence would sanction a fraud.

[4] A corporation will not be recognized as a separate legal entity when used as a channel for an illegitimate business purpose, such as the operation of one's own business under the name of the corporation, or for the purpose of promoting an

injustice that may result in the perpetration of a fraud. Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 124, 17 P.2d 709. In such case law and equity will, when necessary, protect the rights of third parties.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

34 Cal.App.2d 1

## LEE v. SMALL CLAIMS COURT OF JUDICIAL TP. NO. 4, IMPERIAL COUNTY.

Civ. 2315.

District Court of Appeal, Fourth District, California.

July 22, 1939.

**1. Courts 🔑176½**

A judgment entered against a defendant in small claims court without giving him notice thereof until after time for appeal has expired is reviewable by certiorari as an exception to general rule that certiorari cannot be resorted to after expiration of time for appeal. Code Civ.Proc. § 1917.

**2. Courts 🔑176½**

Certiorari proceeding to set aside judgment of the small claims court on ground of lack of jurisdiction was maintainable in the superior court on basis of allegation that defendant did not receive notice of entry of judgment until after expiration of time for appeal. Code Civ.Proc. §§ 117j, 1917.

**3. Courts 🔑176½**

In certiorari proceedings in superior court to have declared void a judgment of the small claims court, all necessary parties should be represented, and the party or parties whose acts are subject of review should be before the court. Code Civ.Proc. §§ 1069, 1917.

**4. Certiorari 🔑37**

Certiorari proceeding to set aside a judgment of an inferior tribunal is against a completed act alleged to have been in excess of jurisdiction rather than against inferior tribunal and real "adverse party in interest" is the one in whose favor act complained of has been done rather than inferior tribunal. Code Civ.Proc. §§ 1069, 1917; Rules of Supreme Court and District Courts of Appeal, rule 26.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

**5. Courts 🔑176½**

In certiorari proceeding, superior court was without authority to set aside judgment of small claims court where writ of certiorari and petition were served on the justice of small claims court who made a return thereto, but no notice of pendency of proceedings was given to party in whose favor judgment was rendered. Code Civ. Proc. § 1069; Rules of Supreme Court and District Courts of Appeal, rule 26.

**6. Certiorari 🔑1**

The province of the writ of certiorari is to review the record of the inferior court to determine whether such court has exceeded its jurisdiction. Code Civ.Proc. § 1917.

**7. Courts 🔑176½**

The lack of jurisdiction of a justice of a small claims court to render judgment for plaintiff in a case in which plaintiff had died pending trial and no administrator of his estate had been appointed and no substitution of parties had been made could be raised by certiorari proceedings in superior court. Code Civ.Proc. § 1917.

---

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Certiorari proceedings by E. A. Lee against the Small Claims Court of Judicial Township No. 4, County of Imperial, State of California, to have declared null and void a judgment rendered by said court, and to have quashed an execution issued on said judgment. From a judgment of the Superior Court declaring void the judgment by the Small Claims Court, the respondent appeals.

Reversed.

Harry W. Horton, of El Centro (Kendall B. Perkins, of Beverly Hills, of counsel), for appellant.

Don C. Bitler, of El Centro, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment rendered in the Superior Court of Imperial county in certiorari proceedings, which judgment declares null and void a certain judgment rendered in the Small Claims Court of Judicial Township No. 4, Imperial County, and voids and quashes an execution issued thereon.

On July 26, 1937, Myrtle G. Haddan commenced an action in the Small Claims Court by the execution of an affidavit in the form prescribed by statute and by filing the same with the justice of the peace of said court. Upon its filing, the justice completed and signed the prescribed order requiring the appearance of certain defendants, including E. A. Lee, respondent on this appeal. Copies of the affidavit and order were personally served upon the defendants on July 28, 1937. By direction of the order, the defendants were required to appear for trial on August 9, 1937, and on that date the defendant Lee made his personal appearance before said court and after certain proceedings had the court continued the trial of the case. Thereafter the plaintiff Myrtle G. Haddan died. On April 22, 1938, the court made the following entry in its docket: "Myrtle Haddan is dead and Phil Haddan is her son and legal heir to her estate, at his request Phil Haddan is joined in this action as a plaintiff and P. I. Haddan, father of Phil Haddan and husband of Myrtle Haddan, and duly appointed administrator of the said estate of Mrs. Myrtle Haddan (deceased) is substituted for Myrtle Haddan as plaintiff in this action." Also, on this date the court set the case for hearing for April 27, 1938, on which day Phil Haddan appeared as a witness and as a party plaintiff and the defendant Lee appeared. Evidence both oral and documentary was introduced. The court then apparently took the matter under advisement and on May 14, 1938, entered judgment for the plaintiff P. I. Haddan, as administrator of the estate of Myrtle G. Haddan, deceased, against the defendant E. A. Lee, for the sum of $38.40, and for costs in the sum of $1.50. The docket entry shows that on May 25, 1938, notice of judgment was given the defendant Lee. No appeal was ever taken from this judgment.

Respondent Lee alleged in his petition for a writ of review that he had no notice of the rendering of said judgment in the Small Claims Court or of the subsequent proceedings until May 24, 1938, ten days after the entry of the judgment. No appeal was taken by defendant Lee in that case, because under section 117j of the Code of Civil Procedure an appeal is required to be taken within five days after entry of judgment, and such period of five days had expired before the respondent Lee discovered the judgment. After the expiration of the time for appeal, the respondent Lee applied to the Superior Court for a writ of review of the proceedings had in the Small Claims Court, and upon the allegations contained in his petition and the evidence offered, the Superior Court granted the writ. The writ was directed to the Small Claims Court. The judge issuing it directed that a copy of the writ and the petition be served upon not only the justice of peace, but also P. I. Haddan, as administrator of the estate of Myrtle G. Haddan, deceased.

It is alleged that no service of the writ or petition was made on P. I. Haddan, nor did he receive notice of any kind of the pendency of the action in the Superior Court, and that it was long after the rendition of the judgment in the Superior Court that knowledge of the proceeding was received by him. The writ, however, was served upon the justice of the peace, and return was duly made.

On the issues presented the court gave judgment for the respondent Lee, declaring the judgment of the Small Claims Court void, and quashed the execution issued thereon. The court also awarded judgment in favor of the respondent and against P. I. Haddan, as administrator, for costs which were taxed in the sum of $26.50. P. I. Haddan, administrator of the estate of Myrtle G. Haddan, deceased, prosecutes this appeal from the judgment of the Superior Court as the real party in interest, and on behalf of the Small Claims Court of Judicial Township No. 4.

Appellant contends that the judgment of the Superior Court should be reversed in that it appears from the judgment itself that the considerations upon which the court based its decision are entirely foreign to questions which may properly be considered in certiorari; that the court entertained the proceedings when it appeared that there was in fact a plain, speedy and adequate remedy open to the respondent Lee by appeal; that the Superior Court never acquired jurisdiction of the person of P. I. Haddan, as administrator, in that no process of court or notice of any kind of the pendency of the Superior Court action was ever given said Haddan, and for the further reason that the proceedings of the Small Claims Court showed clearly that it had complete jurisdiction of the parties to the proceedings therein, as well as the subject matter of the action, and that in such a case the Superior Court is without authority to render judgment. The judgment of the Superior Court purports to annul the judgment of the Small Claims Court on several specified grounds.

In the instant case petitioner alleged that the rendering of the judgment, the issuance of the writ of execution, the levy of the constable on two Superior Court judgments which were subsequently sold, and the satisfaction of these two judgments by the execution purchasers were wholly without notice to petitioner and that he did not discover or learn of the rendering of the judgment in the Small Claims Court or the subsequent proceedings until May 24, 1938, more than five days from the entry of the judgment.

[1, 2] It has been well established in this state that there is an exception to the general rule that certiorari cannot be resorted to after expiration of the time for appeal, where a judgment is entered against a defendant in the Small Claims Court without giving defendant notice thereof until after the time for appeal has expired. Under such circumstances as here related, certiorari is a proper remedy to review the judgment. O'Kuna v. Small Claims Court of the Township of Palo Alto, etc., 81 Cal. App. 588, 254 P. 291; Elder v. Justice's Court, 136 Cal. 364, 68 P. 1022. Petitioner has sufficiently complied with the statutory requirements in this respect.

Appellant argues that the trial court in the instant case never acquired jurisdiction of the person of P. I. Haddan, as administrator, for the reason that no process of court or notice of any description of the pendency of the Superior Court action was ever given Haddan, as administrator. The petition was entitled as above related. Haddan, as administrator, was not named as party defendant therein. The judge who issued the writ, in addition to commanding that the respondent Small Claims Court certify the transcript of all papers, files, evidence taken and proceedings had in the action in that court in order that the same might be reviewed by the Superior Court, ordered that a copy of the writ and petition be personally served upon the justice and upon P. I. Haddan, as administrator of the estate of Myrtle G. Haddan, deceased, "not less than five days of the date above fixed (June 10, 1938) for the return of said writ of review". The judgment on the writ of review recites that the respondent H. B. Griffin, judge of the respondent Small Claims Court, appeared and filed his return. The matter was then submitted for decision. The court then found that the judgment in the Small Claims Court was void and without force or effect and ordered it vacated, and quashed the execution issued thereon.

Section 1069 of the Code of Civil Procedure reads in part as follows: "* * * the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice."

[3, 4] It is a general rule that all necessary parties should be represented and that the party or parties whose acts are the subject of review should be before the court. Lamb v. Schottler, 54 Cal. 319; Fraser v. Freelon, 53 Cal. 644. While the general rule may be stated to be that the court is the only necessary party respondent in an action to review its orders, still the proceeding is against the completed act alleged to have been in excess of jurisdiction, rather than against the inferior tribunal. The real adverse party in interest, therefore, is the one in whose favor the act complained of has been done. The tribunal whose act is assailed has no greater interest in the matter in which it has simply acted in a judicial capacity than it has in ordinary appeals from its orders or judgments. The fact that the court is, in no sense, considered the real party in interest is clearly brought out in rule XXVI of the rules for the Supreme Court and District Courts of Appeal, which is as follows: "In case any court, judge, or other officer, or any board, or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings." This general rule receives support in the case of Pollock v. Cummings, 38 Cal. 683, wherein the court said: "There is no express provision in

the statute that when a party to an action applies for or procures a writ of certiorari to bring up the record and proceedings in the action he shall notify the adverse party; but it is provided by the 457th Section that the Court may order notice of the application to be given to him. It is obvious, however, that he should be duly notified of the proceedings, for the judgment annulling the judgment of the inferior tribunal would not bind him, unless he had his day in Court, on the hearing of the certiorari. Notice of these proceedings ought, therefore, to have been given to the defendant to the action." See, also, Fraser v. Freelon, supra; Baker v. Superior Court, 71 Cal. 583, 12 P. 685; McMinn v. Whelan, 27 Cal. 300; Havemeyer v. Superior Court, 84 Cal. 327, 372, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Matter of De Lucca, 146 Cal. 110, 79 P. 853; I. X. L. Lime Co. v. Superior Court, 143 Cal. 170, 76 P. 973. Thomas, Jr., v. Hawkins, 12 Cal.App. 327, 107 P. 578, appears to have a contrary ruling.

[5, 6] For the reasons stated, we are therefore of the opinion that in the instant case, where one judge of the Superior Court directed that notice be given to the real party in interest, that is, P. I. Haddan, as administrator of the estate of Myrtle G. Haddan, deceased, and that at the time set for the hearing of the petition for writ of certiorari, service of such notice of the real party in interest had not been made, it is error and contrary to the long-established policy of our courts for another judge of the same court, without some further order, to proceed with the hearing and render a judgment declaring the judgment in the Small Claims Court in favor of P. I. Haddan, as administrator, null and void, and particularly so where there was included in the order a judgment for costs against the administrator who was not a party thereto, who had no notice of the proceedings, and did not appear in the action. Many of the assigned grounds for granting the writ of certiorari and annulling the Small Claims Court judgment do not involve the jurisdiction of the Small Claims Court. The province of the writ of certiorari is to review the record of the inferior court to determine from the record whether such court has exceeded its jurisdiction. Rinaldo v. Superior Court, 15 Cal.App.2d 585, 59 P.2d 868; section 1917, Code Civ.Proc.; Hahn v. Kelly, 34 Cal. 391, 402, 94 Am.Dec. 742; Grant v. Justice's Court, 1 Cal.App. 383, 82 P. 263.

[7] Assuming, as intimated in the pleadings, that no administrator of the estate of Myrtle G. Haddan, deceased, had been appointed, and no proper substitution made as alleged, the jurisdiction of a justice of a Small Claims Court to proceed to enter judgment under those circumstances can be properly assailed. Boyd v. Lancaster, Cal. App., 90 P.2d 317; Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162; Maxon v. Avery, Cal.App., 89 P.2d 684.

For the reasons herein stated, it is ordered that the judgment be reversed.

We concur: BARNARD, P. J.; MARKS, J.

---

33 Cal.App.2d 725

**GRANT v. LONG et al.**

**Civ. 2337.**

District Court of Appeal, Fourth District, California.

July 21, 1939.

Rehearing Denied Aug. 18, 1939.

Hearing Denied Sept. 18, 1939.

**1. Appeal and error 🔑1010(1)**

If evidence sustained findings and findings supported judgment, appellate court could not reverse judgment unless serious prejudicial errors occurred in the trial.

**2. Frauds, statute of 🔑56(1)**

Whether estate created in hotel property by alleged contract, whereby husband and wife during their lifetime or the lifetime of either of them were to receive free apartment and free maintenance from the hotel of which husband was president and director, was a vested life estate in joint tenancy with right of survivorship or a trust for the benefit of the husband and wife as joint tenants with right of survivorship, it was an estate in realty which could have been created only by an instrument in writing unless the statute of frauds was inapplicable under the special facts and circumstances.

**Contracts 🔑3**

An "express contract" is one the terms of which are stated in words, but one party may use the words and the other may accept either in words or by his actions or conduct. Civ.Code, §§ 1619–1621.

[Ed. Note.—For other definitions of "Express Contract," see Words & Phrases.]

**4. Contracts 🔑4**

An "implied contract" is one that is inferred from the conduct, situation, or mutual relation of the parties, and enforced by the law on the ground of justice. Civ.Code, §§ 1619–1621.

[Ed. Note.—For other definitions of "Implied Contract," see Words & Phrases.]

**5. Contracts 🔑4**

The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. Civ.Code, §§ 1619–1621.

**6. Contracts 🔑4**

As respects the establishing of an implied contract, the law will imply that a party did make such a stipulation as under the circumstances disclosed he ought upon the principles of honesty, justice, and fairness to have made.

**7. Contracts 🔑47**

Both express and implied contracts must be supported by adequate considerations. Civ.Code, § 1605.

**8. Corporations 🔑316(1)**

A contract, obligating hotel corporation to furnish president and director of the corporation and his wife with free apartment and free service and maintenance for their lifetime or the life of either of them, could not be established by conversations between the president and his wife not held in the presence of other corporate officers, since, as beneficiary of the alleged contract, the president could not bind the corporation without express and formal authority from the board of directors.

**9. Contracts 🔑4**

Where for over 15 years husband and wife received free apartment and free service and maintenance from hotel of which husband was president and director, and for more than 5 years after husband's death wife received the same free accommodations, and other officers and directors of hotel corporation knew that such free accommodations were claimed as a matter of right and did not object but by their conduct and admissions agreed to the furnishing of the free accommodations, an "implied contract" on part of the hotel corporation to furnish the free accommodations during the lifetime of the husband and wife or of either of them was established.

**10. Contracts 🔑170(1)**

Where the terms of a contract are not clearly expressed in words, the construction put upon them by the contemporaneous acts of the parties furnish a reliable means of arriving at their intention in entering into the contract.

**11. Estoppel 🔑92(2)**

Where hotel corporation received benefits under a trust agreement executed by president and director of the hotel corporation, which trust agreement indicated that president and his wife claimed right to free use of apartment and free service and maintenance from the hotel for their lifetime or the lifetime of either of them, hotel corporation, which did not object to the claim and retained benefits of the trust, was estopped to repudiate later its obligations under its implied contract to furnish the free accommodations.

**12. Frauds, statute of 🔑119(2)**

The fundamental rule, that as the statute of frauds is designed to prevent fraud it cannot be invoked to perpetrate a fraud, is based on the doctrine of estoppel and is applied in cases in which one party in reliance on a parol contract that should have been reduced to writing has changed his position or parted with value so that it would be an injustice to permit the other party to plead the statute of frauds.

**13. Frauds, statute of 🔑144**

Where hotel corporation through its agents and officers made implied parol contract with president of the corporation and his wife whereby hotel was obligated to furnish them free use of apartment and free service and maintenance during their lifetime or the lifetime of either of them, and the contract was performed for many years, and the president and his wife were permitted to change their position by parting with certain bonds to the benefit of the hotel corporation, hotel corporation was estopped from denying its contract on ground it was within statute of frauds and required to be in writing.

**14. Frauds, statute of ⚷129(1)**

A contract partly performed is usually taken out of the operation of the statute of frauds.

**15. Appeal and error ⚷931(1)**

If either one of two inferences reasonably may be drawn from the same evidence, it is the duty of an appellate court to draw the inference favorable to the party that prevailed in the trial court.

**16. Appeal and error ⚷1011(1)**

In declaratory action to establish a contract obligating hotel corporation to furnish free use of apartment and free service and maintenance to president of the corporation and his wife, finding of the trial judge on conflicting evidence that the corporation had knowledge that the free accommodations were claimed as a matter of contract right was conclusive upon reviewing court.

**17. Action ⚷6**

A declaratory judgment establishing contract right of plaintiff to free hotel service, food, and refreshments was merely declaratory and was neither mandatory nor prohibitory, hence was not objectionable on ground contract required personal service and so could not be specifically enforced.

**18. Contracts ⚷1**

Notwithstanding a contract cannot be specifically enforced, it may form the basis for other legal rights.

**19. Corporations ⚷94**

The fact that a stock certificate was not issued to alleged purchaser of stock was not conclusive evidence that the alleged purchaser had not purchased and did not own the stock, where under the law at the time of the alleged purchase the stock could be sold or assigned without a certificate, and a certificate was merely evidence of ownership.

**20. Action ⚷6**

A declaratory judgment establishing contract right of plaintiff to free use of hotel apartment and free hotel service, food, and refreshments for herself and her guests was not objectionable as being too uncertain to be understood or enforced, since the judgment was not mandatory or prohibitory, but was merely declaratory of the rights of the parties, and was drawn in accordance with construction put upon the contract by the parties by their performance for many years.

**21. Appeal and error ⚷1051(1)**

In declaratory action to establish implied contract on part of hotel corporation to furnish free hotel apartment and free hotel service and maintenance to president of the corporation and his wife, erroneous admission of certain conversations between the president and his wife when no representative of the corporation other than the president was present was harmless where the contract was established by other evidence.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by America W. Grant against Baron Long, Martha Long, U. S. Grant Hotel & Office Building Company, U. S. Grant Company, E. L. Potter, G. A. Davidson, Marc Ryan, LeRoy A. Wright, and Edward S. Bernard and others for a declaratory judgment that plaintiff was entitled to the free use of an apartment in a hotel and free service and meals and refreshments for herself and her guests during the remainder of her life. From a judgment for plaintiff, the named defendants appeal.

Judgment affirmed.

Wright, Monroe & Harden, of San Diego, for appellants.

Charles C. Crouch, of San Diego, George W. Crouch, of Los Angeles, and O. A. Thorpe, of San Diego, for respondent.

MARKS, Justice.

This is an action for declaratory relief, and certain defendants have appealed from the judgment giving plaintiff the right to the free use of an apartment in the U. S. Grant Hotel in San Diego and free service and meals and refreshments (not including alcoholic beverages) for herself and her guests during the remainder of her life.

Appellants' principal attack on the judgment is based on the insufficiency of the evidence to support the findings, and the insufficiency of the findings to support the judgment. To properly understand and consider the issues thus raised requires a somewhat detailed statement of the evidence. We will, however, largely disregard the sharp conflicts in the evidence and confine ourselves to a summary of that which supports the findings and judgment.

Prior to 1909, U. S. Grant, Jr., owned an eleven-story hotel building on property facing on Broadway, between Third and Fourth avenues, in the city of San Diego, In May, 1909, the U. S. Grant Hotel and Office Building Company was organized. We will hereafter refer to this corporation as the Hotel Company. In June, 1909, U. S. Grant, Jr., conveyed the hotel property to the Hotel Company which has owned it ever since.

U. S. Grant, Jr., owned 16,000 shares, being all the issued capital stock of the Hotel Company, from which certain qualifying shares were issued to certain directors. In hereafter noting the various changes in ownership of the stock we will not take into consideration the qualifying shares standing in the names of directors but actually owned by others.

A bond issue in the sum of $600,000 was secured by a first lien on the hotel property. A second bond issue in the sum of $1,000,000 was secured by a second incumbrance on the property. A relatively small amount of these second mortgage bonds had been sold to the public. The balance of them, over $900,000 in par value, were owned by U. S. Grant, Jr. These bonds were regarded as an adjunct to ownership of the stock. When a sale of stock was made it carried with it a transfer of an equal proportionate amount of the bonds.

Shortly after the incorporation of the Hotel Company, the U. S. Grant Company was organized. It was a family estate company, used for the purpose of holding the property of U. S. Grant, Jr., for the protection of his children, the issue of a marriage prior to his marriage to America W. Grant.

Prior to April 27, 1910, the Grant-Holmes Hotel Operating Company was organized. On that date it was given a lease on the hotel property, with the exception of some first floor stores. It was given a second lease for thirteen years on October 11, 1917. This lease did not contain any reservations of any hotel rooms. This company continued to operate the hotel until 1921, when it was seemingly permitted to go out of existence. The lease seems to have been abandoned by common consent.

U. S. Grant, Jr., was president and director of the Hotel Company, and of the U. S. Grant Company, up to the time of his death on September 26, 1929. He held the same positions in the Grant-Holmes Hotel Operating Company until it passed from the picture.

U. S. Grant, Jr., married America W. Grant in 1913. Shortly after their marriage they occupied a suite in the U. S. Grant Hotel. After a few years this suite was enlarged. They continued to occupy it until the death of Mr. Grant. They spent about $4,000 in remodeling four hotel rooms into a convenient living apartment which was separated from the balance of the hotel. Mr. and Mrs. Grant were charged no rent for their apartment and were furnished free service and free meals and refreshments for themselves and their guests. After the death of Mr. Grant, Mrs. Grant continued to occupy the apartment and received like accommodations and service without charge. On March 11, 1935, the board of directors of the Hotel Company passed a resolution permitting her to use her apartment free of rent and allowing her complimentary charges of twenty-five dollars a week in lieu of the previous service of unlimited free meals and refreshments for herself and her guests. This was occasioned by the sudden growth of Mrs. Grant's complimentary charges. In 1932 and 1933, they averaged about $750 per year for meals and refreshments. In January, 1935, her service for wines and liquors alone amounted to $198.55, and in February of that year, to $204.04.

This action on the part of the Hotel Company precipitated a controversy with Mrs. Grant. She maintained that what she had been receiving from the Hotel Company was a matter of right based on contract. The Hotel Company claimed it was a matter of accommodation under a revokable license.

In March, 1936, the Hotel Company caused Mrs. Grant to be notified that thereafter she would be charged $350 per month rent for the apartment and the value of the meals and refreshments furnished to her or her guests. This action followed.

After a protracted trial the court found that Mrs. Grant had a legally established right to the free use of the apartment and to free service, meals and refreshments, not including alcoholic beverages, for herself and her guests during the rest of her life. This appeal followed.

We must summarize the transfers of the stock and the second mortgage bonds of the Hotel Company in order to give a proper picture of the transactions which the trial judge took into consideration in rendering his judgment.

Mrs. Grant testified that in 1914, or 1915, she purchased from her husband, for $80,000, one-half of the issued stock and one-half of the second mortgage bonds of the Hotel Company which were owned by him. On a statement prepared by an officer of the Hotel Company early in 1925, which showed the interest payments upon and ownership of these bonds, U. S. Grant, Jr., wrote the following: "U. S. Grant Jr's 1/4 long since transferred to America W. Grant. U. S. Grant, Jr." This statement was produced from the files of the Hotel Company.

No stock was transferred of record to the name of Mrs. Grant until August 12, 1920, when a certificate for five shares was issued to her. On March 8, 1923, a certificate for 3997 shares was issued to U. S. and America W. Grant. On December 26, 1925, this certificate was canceled and one for 3998 was issued to America W. Grant.

In 1914 eight thousand shares of the capital stock of the Hotel Company was issued to the U. S. Grant Company. This carried ownership of a proportionate share of the second mortgage bonds.

In the fall of 1919 Baron Long and E. L. Potter purchased from Barker, Holmes, the Barber Company, and U. S. Grant, Jr., stock of the Grant-Holmes Hotel Operating Company which equalled one-half of the issued stock of that company. The other half of the stock stood in the name of U. S. Grant, Jr.

Baron Long took over the active management of the hotel for the Grant-Holmes Hotel Operating Company in 1919, or 1920.

At the time of this transfer of ownership and management, U. S. Grant, Jr., discussed with Baron Long the continuance of the use of the hotel apartment by himself and Mrs. Grant. Mr. Long testified that he replied to the questions of Mr. Grant as follows: "I said, 'You are president of this company, Mr. Grant, and that entitles you to all privileges here.' And I added: 'In addition I would consider you a great asset to this company.'"

Probably in 1920, Baron Long began negotiations for the purchase, by himself and E. L. Potter, of one-half of the stock in the Hotel Company, including a proportionate share of the second mortgage bonds. On October 4, 1920, certificates for four thousand shares each were issued to Baron Long and E. L. Potter. Mr. Long was continued in his position as active manager of the hotel. He also became a director of the Hotel Company.

In 1921, a plan for the retirement of the second mortgage bonds was inaugurated. A trust was established with The Southern Trust and Commerce Bank as trustee since absorbed by the Bank of America National Trust and Savings Association (hereinafter called The Bank), in which all bonds owned by the stockholders of the Hotel Company were deposited. The trust agreement bears the date of April 7, 1921, and contains the following:

"Now, Therefore, It Is Mutually Agreed between the undersigned as follows:

"(a) These bonds are to remain in trust with the Southern Trust and Commerce Bank until the 1st day of July, 1930, which is the date of the expiration of the first mortgage bonds. On the last mentioned date all of the aforesaid second mortgage bonds, together with all unclipped and unpaid, or unpaid, coupons, are to be turned over to the U. S. Grant Hotel & Office Building Company free of charge.

"(b) During the life of said trust and until the said first day of July, 1930, any of the due coupons, or past due coupons, which the company is able to pay are to be distributed to the various stockholders who have subscribed to this memorandum of agreement, in proportion to the bonds held by each of said stockholders.

"In Witness Whereof we have hereunto set our hands the day and year first above written.

| | Amt. of bonds |
|---|---|
| Baron Long | $121,875. |
| Martha Long | $121,875. |
| E. L. Potter | $243,750. |
| U. S. Grant Co.<br>By U. S. Grant Jr., Pres. | $243,750. |
| U. S. Grant, Jr. | $243,750." |

This trust, through subsequent purchases, acquired others of these bonds so that the bonds held by the trust had a total par value of $999,000.

Under date of January 16, 1926, the U. S. Grant, Jr., Trust was organized. This trust held all of the stock and interest in the second mortgage bonds of the Hotel

Company belonging to U. S. Grant, Jr., and America W. Grant. It was executed by U. S. Grant, Jr., and his children and America W. Grant, who were the beneficiaries with certain grandchildren of U. S. Grant, Jr. The Hotel Company was not a party to this trust. The declaration of trust created "the office or position of adviser and referee to the trustee" and named Baron Long to fill it. He acted in that capacity for some time. No investment of trust funds in excess of $900 could be made by the trustee without the written consent of the "adviser and trustee".

The declaration of trust contained the following: "U. S. Grant, Jr., and America W. Grant, husband and wife, also hereby sell, transfer, set over and convey to the Southern Trust and Commerce Bank, and its successor or successors, in trust nevertheless as provided in this trust agreement, second mortgage bonds of the U. S. Grant Hotel & Office Building Company of the par value or Two Hundred Forty-four Thousand Seven Hundred Fifty Dollars ($244,750); together with their, and each of their interests in and to any and all like bonds hereafter acquired; subject, however, to the terms, covenants and conditions of a written agreement of the stockholders of the U. S. Grant Hotel & Office Building Company entered into under date of April 7, 1921, whereby Nine Hundred Seventy-five Thousand Dollars ($975,000.00), par value, of second mortgage bonds were placed in trust with the Trust Department of the Southern Trust and Commerce Bank, for purposes therein specifically set forth, and other bonds as acquired were to be placed in the same trust; and their present arrangement for residence of U. S. Grant, Jr., and America W. Grant in the U. S. Grant Hotel shall not, during their lifetime or the lifetime of either of them, be disturbed by the trustors or the Trustee."

At the time of the trial of this action the books of the Hotel Company showed the following ownership of its stock: U. S. Grant Company, four thousand shares; U. S. Grant, Jr., trust, four thousand shares; Baron Long, four thousand shares; E. L. Potter, four thousand shares.

The first mortgage bonds of the Hotel Company became due on July 1, 1930, with all or a large portion of them unpaid. The Hotel Company borrowed from The Bank, on its note secured by the second mortgage bonds, sufficient money with which to pay these first mortgage bonds. The second mortgage bonds are still security for its note on which there remains a balance of about five hundred thousand dollars of unpaid principal.

The claim of Mrs. Grant to the free use of the hotel apartment, and to free service, meals and refreshments, is principally based on the conduct of the parties over a long period of years and on her testimony which was corroborated in several of its most important details by the evidence of other witnesses.

Mrs. Grant described a statement made by her husband in a conversation with her which occurred at the time of the transfer of stock to the U. S. Grant Company, as follows: "'Now as a matter of fact' he says, 'you have the other half interest in the U. S. Grant Hotel & Office Building Company, it is your home, it is yours' * * *."

Mrs. Grant detailed a conversation with Baron Long in October, 1920, just before Long and Potter purchased stock in the Hotel Company, as follows: "Mr. Long came up and the conversation was that the hotel was very much run down and it needed a great deal of repairing, and that he and his wife and Mr. Potter wanted to buy an interest in the U. S. Grant Hotel & Office Building, to which I objected, and he wanted to know why, what my objection was. I said, 'Well, Mr. Long,' I said, 'We cannot sell part of the hotel because this is our home; we cannot sell you an interest in the hotel because this is our home and one doesn't sell an interest in their home,' and he said, 'Well, now, Mrs. Grant', he said, 'I know this is your home; it always has been your home and it always shall be your home, no one shall ever disturb you,' he said, 'I speak for my wife, Mrs. Long and for Mr. Potter.' * * He said, 'This is your home. It always will be your home, no one will ever disturb you in your home; things shall go on just as they are, Mrs. Grant; I speak for Mr. Potter and my wife.'"

A conference was held, probably very early in October, 1920, concerning the sale of the stock to Long and Potter. There were present, besides Mrs. Grant, Mr. Long, manager of the Hotel, Mr. Grant, president and director, Mr. Thompson, director and assistant secretary, and Messrs. Wright and Hall, directors of the Hotel Company. Mrs. Grant testified that the details of the sale of stock were argued and discussed; that she said their home in the hotel must not be interfered with; that it must be understood that the Grants were to continue to have their home in the hotel; that Mr. Grant replied, "That is understood"; that no one present made any objection to that reply.

Mrs. Grant testified that when the second mortgage bonds were being deposited in the trust created by the agreement of April 7, 1921, she said to her husband: "It will not interfere with our home? We are to have our home here for life, our maintenance?" and that he replied, "Yes, everything is arranged."

Jack C. Thompson, a director and assistant secretary of the Hotel Company, admitted saying, in relation to the deposit of the second mortgage bonds in the trust of April 7, 1921, "I think it was understood that U. S. Grant was to have the quarters in the hotel that were then specially fitted for them and their subsistence."

Mrs. Grant also discussed the same subject with one of the directors of the Hotel Company at the time she signed the U. S. Grant, Jr., trust indenture in January, 1926. She testified that this director assured her that the right of Mr. Grant and herself to the free use of the apartment was fully protected. She also testified that at about this same time, in advising her to sign this trust indenture, Baron Long said, "I think the set-up for you is very fine * * *. You have your home here, you have your food, you have your income for life and no one can touch your property. * * * I think it is a wonderful set-up."

Shortly after the death of Mr. Grant, Baron Long said to Mrs. Grant, "I do not know of anybody, of any woman sitting prettier than you are today; here you are, you have twenty-five thousand dollars a year income; you have your apartment; you have your maintenance for yourself and friends as long as you live."

Mrs. Grant testified that ever since her marriage to Mr. Grant, the hotel had furnished "room, the apartment, maid service, kitchen service and food without charge."

It is perfectly clear from the record that the officers and directors of the Hotel Company who were active in the management of its affairs knew that Mr. and Mrs. Grant were receiving, and after his death, Mrs. Grant was receiving free rent, hotel service, meals and refreshments. Appellants maintain that these services are customarily granted to the president of a hotel corporation; that after Mr. Grant's death they continued the free services to Mrs. Grant out of respect for the memory of her husband and because she was a large stockholder in the corporation. They urge that none of them had any knowledge or notice that either Mr. or Mrs. Grant claimed these services as a matter of right until in March, 1935.

[1] Before passing to a discussion of the numerous legal questions ably presented by counsel we wish to state that the evidence is hopelessly conflicting on the important issues of the case. The trial court accepted respondent's evidence as true. If that evidence sustains the findings and if the findings support the judgment, we cannot reverse it unless serious prejudicial errors occurred in the trial.

The first question argued is the nature of the estate, if any, acquired by Mr. and Mrs. Grant in the hotel property. Appellants urge that it could be nothing but a life estate in joint tenancy with the right of survivorship; that such an estate is an interest in real property which can only be created by an instrument in writing; that as the estate claimed by respondent is not supported by any writing the attempt to create it was void (sec. 1624, Civ.Code); that therefore Mrs. Grant had only a revokable license to enjoy such privileges as the Hotel Company might have chosen to extend to her.

Respondent suggests, rather than urges, that the evidence supports the conclusion that a trust in the apartment was created by operation of law; that the legal title remained in the Hotel Company subject to a vested right in Mr. and Mrs. Grant and, after Mr. Grant's death, in Mrs. Grant, as beneficiaries of the trust to have the free use and exclusive occupancy of the apartment.

[2] We incline to the view that the estate attempted to be created, rather than being a vested life estate in joint tenancy, was a trust with a life estate in joint tenancy with the right of survivorship with Mr. and Mrs. Grant as beneficiaries. Restatement of the Law of Trusts, vol. 1, pp. 149, 150; Haskell v. First National Bank, Cal.App., 91 P.2d 934. A discussion of the question of whether a vested life estate or a trust was created would be purely academic, and of no effect on the real questions at issue. If a vested life estate was created it was in joint tenancy with the

right of survivorship. If a trust was created it was for the benefit of Mr. and Mrs. Grant as joint tenants with the rights of survivorship. Both are estates in real property that could have been created only by instruments in writing unless the facts before us bring the case without the provisions of the statute of frauds.

Appellants urge that, given its greatest possible weight and effect, the evidence falls short of establishing any contract for the free use of the apartment and free service, meals and refreshments, upon which any life estate can be predicated; that the Hotel Company was not in possession of and did not operate the hotel until 1921; that any conversations prior to that date concerning the apartment and service could only affect the Grant-Holmes Hotel Operating Company, the lessee, and could not create an interest in or place a burden on the property of the Hotel Company; that after that date the Hotel Company could not be bound by the acts or admissions of its officers or agents because no authority was given any of them to bind it; that while Mr. Grant was the president and director of the Hotel Company he was claiming an interest adverse to it; that an officer or agent of a corporation cannot without express authority, create, by any act or failure to act, an estate in himself in the corporate property hostile and adverse to that of the corporation.

We are not inclined to place any serious reliance on the private conversations between Mr. and Mrs. Grant. However, the evidence does show that for over fifteen years Mr. and Mrs. Grant received, and for an additional five and one-half years Mrs. Grant has received the service she now claims. There is sufficient evidence in the record, which the trial judge accepted as true, to establish that Mrs. Grant claimed to officers and directors of the Hotel Company, other than her husband, the free use of the apartment and free service as a matter of right.

"A contract is either express or implied." § 1619, Civ.Code. "An express contract is one, the terms of which are stated in words." § 1620, Civ.Code. "An implied contract is one, the existence and terms of which are manifested by conduct." § 1621, Civ.Code.

[3] While an express contract is one, the terms of which are stated in words (Treadwell v. Nickel, 194 Cal. 243, 228 P. 25), one party may use the words and the other may accept, either in words or by his actions or conduct. Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860.

[4, 5] An implied contract is one that "is inferred from the conduct, situation, or mutual relation of the parties and enforced by the law on the ground of justice". Jennings v. Bank of California, 79 Cal. 323, 21 P. 852, 853, 5 L.R.A. 233, 12 Am.St.Rep. 145. "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words." Dunham-Carrigan & Hayden Co. v. Rubber Co., 84 Cal.App. 669, 258 P. 663, 664.

[6, 7] "In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation as under the circumstances disclosed, he ought, upon the principles of honesty, justice, and fairness to have made." Smith v. Moynihan, 44 Cal. 53, at page 62. Of course, both kinds of contracts must be supported by adequate considerations. § 1605, Civ.Code.

We must measure the facts before us by the foregoing simple and well-established rules of the law of contracts, which, while clear in themselves, are sometimes difficult to apply to an involved factual situation such as confronts us here.

[8] In approaching this question it should be first clearly stated that the private conversations between Mr. and Mrs. Grant, upon which the latter in part relies to establish the contract, should be disregarded. While Mr. Grant was president and director of the three corporations involved, he was also receiving free rent of the apartment and free service and meals. Thus he was a beneficiary of any contract between himself and the corporations, or either of them, and himself. He should not be permitted to make any statement as president of a corporation that would bind it to him as the individual to benefit by it, without express and formal authority from the board of directors of the corporation. This he did not have. In other words, he, simply because he was an officer of a corporation, could not contract with himself as an individual and bind the corporation to give him, the individual, a valuable property right and valuable serv-

ice over a period of years. To permit a corporate official to do so would open the door to fraud (not appearing here) and would permit an unscrupulous officer to despoil the corporation and its stockholders of the corporate assets. We will, therefore, eliminate from our consideration all conversations occurring between Mr. and Mrs. Grant not held in the presence of other corporate officials. By so doing plaintiff is forced to rely upon a contract implied from the conduct of the parties over a considerable number of years, the statements of the officers of the Hotel Company, and the knowledge of the Hotel Company of those dealings as shown by statements and admissions of its officers, other than Mr. Grant.

[9] It cannot be doubted that Mr. and Mrs. Grant had been given the free use of their apartment, free service, meals and refreshments from 1914 to 1919, when Baron Long assumed the management of the hotel for the Grant-Holmes Hotel Operating Company. Baron Long continued this free service on the part of this operating company until January 1, 1921, when he took over the management of the hotel for the Hotel Company. Up to that time the accommodations were furnished by the operating company and not the Hotel Company. After that time they were furnished by the Hotel Company.

During the negotiations in 1920 for the purchase of one-half the stock and second mortgage bonds of the Hotel Company by Baron Long and E. L. Potter, Mrs. Grant made it clear that the free use of the apartment and free service, meals and refreshments were then claimed by Mr. and Mrs. Grant for the rest of their lives. Mr. Long agreed that these free accommodations would be continued. He knew just what had been furnished for he, as manager, had been furnishing that service for at least a year.

At the conference held in October, 1920, at which at least three directors of the Hotel Company, other than Mr. Grant, were present, it was made clear that the Grants were to continue to receive their free accommodations in the hotel. While it was Mr. Grant who replied to his wife, "That is understood," those present acquiesced in that reply by their silence.

We regard the signing of the trust agreement of April 7, 1921, and the conversations which occurred at that time as a most important factor in the case. One of the directors admitted that at that time it was understood that Mr. Grant was to have his quarters and subsistence in the hotel. With that understanding the trust agreement was signed and the Grants deposited $243,750, in par value of the second mortgage bonds in the trust, with the Hotel Company as the ultimate beneficiary. The Hotel Company now has those bonds. Those bonds, with others, are now used by the Hotel Company to secure its note for about $500,000.

[10] That the Hotel Company, through its officers and directors, had full knowledge of the terms of the implied contract from the time it took over the management of the hotel on January 1, 1921, to March, 1935, cannot be doubted. It fully conformed to all of those terms and performed its obligations during those fourteen years. By its performance it showed not only knowledge of the contract, its assent to all of its terms, but placed its practical construction on it. Where the terms of a contract are not clearly expressed in words the construction put upon them by the contemporaneous acts of the parties to it furnish a most reliable means of arriving at their intention in entering into it. Skousen v. Herz, 135 Cal.App. 116, 26 P. 2d 498.

[11] The testimony which we have quoted clearly shows that after January 1, 1921, the officers of the Hotel Company clearly recognized the binding effect of the contract. Their statements to Mr. and Mrs. Grant could have no other effect than that of lulling them into a sense of security and into a belief that there was a valid and binding contract for the free accommodations for themselves and the survivor of them. The Hotel Company, during all of that time, was the beneficiary of the trust of April 7, 1921. If it did not consider itself bound by the implied contract it should have spoken years ago when the claim of the accommodations as a matter of right became so apparent that it could not be doubted. If that time was not fixed by prior conversations and conduct it was fixed by the U. S. Grant, Jr., trust of 1926, for the declaration of trust contained a written acknowledgment that the claim was a claim of right. One of the directors of the Hotel Company prepared that document. Baron Long was named in it as "adviser and referee to the trustee" and acted as such. He advised Mrs. Grant to sign it. Baron Long and

the director who prepared the declaration of trust are charged with notice of its contents and through them the Hotel Company is charged with like notice.

The Hotel Company still retains all the benefits it derived under the trust of April 7, 1921. It even now has made no offer to return any of the Grant bonds it received under it. It should not be permitted to retain all the benefits of its implied contract with Mr. and Mrs. Grant and repudiate its obligations under that contract.

We must now consider the effect of the statute of frauds on the question of the validity of the implied contract we are considering.

[12] It is a fundamental rule that as the statute of frauds is designed to prevent fraud it cannot be invoked to perpetrate a fraud. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661; Tuck v. Gudnason, 11 Cal.App.2d 626, 54 P.2d 88. This rule is based in the doctrine of estoppel. It is applied in those cases in which one party, in reliance on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to plead the statute of frauds. This rule was announced in Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770, 772, as follows:

"It is, of course, well settled, under the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, that certain contracts to be enforceable are required to be in writing, or that some note or memorandum thereof be in writing, subscribed by the party to be charged, or his agent. It is also equally well settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198. * * *

" 'It was said in Glass v. Hulbert, 102 Mass. 24, 35, 3 Am.Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. * * *

" 'We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies "in every transaction where the statute is invoked." It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U.S. [578] 580, 25 L.Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. [677] 687, 47 P. [695] 697, as follows: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."' This broad rule with reference to equitable estoppel was recently reaffirmed in the case of Notten v. Mensing, supra. The latter case quoted with approval the rule stated in the case of Anderson v. Hubble, 93 Ind. 570, 576, 47 Am.Rep. 394, as follows: ' "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. * * * All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design."'"

[13] We believe the instant case comes squarely within the rule thus announced in the Wilson case. The Hotel Company permitted its agents and officers to make representations to Mr. and Mrs. Grant and to perform the implied parol contract with them, and with Mrs. Grant for years. It permitted them to change their position by parting with the bonds which it still retains. It cannot deny the authority of its agents and refuse to be bound by the contract they made and still retain the benefits of such contract. E. Aigeltinger v. Burke, 176 Cal. 621, 169 P. 373. Its agents were silent, when they should have spoken and now they and their principal are estopped from denying their contract. Ayres v. Palmer, 57 Cal. 309.

[14] Further, a contract partly performed is usually taken out of the operation of the statute of frauds. Haskell v. First National Bank, supra.

Appellants urge that there can be no estoppel because they did not know that Mr. and Mrs. Grant were claiming free rent of the apartment and free service, meals and refreshments, until after March, 1935, it being necessary that the party estopped have knowledge of all the facts upon which the estoppel is based.

This argument is based on the testimony of various witnesses that the president (and his family) of a hotel corporation is always given the free accommodations that were furnished to Mr. and Mrs. Grant; that these accommodations were furnished in accordance with this custom and therefore amounted to nothing more than a revokable license and implied no notice of a claim of right to them by Mr. or Mrs. Grant.

[15, 16] This evidence merely conflicts with the evidence produced on behalf of Mrs. Grant which we have already set forth. Conflicts in the evidence are addressed to the trial judge and settled by him. It is the law that if either one of two inferences reasonably may be drawn from the same evidence it is the duty of an appellate court to draw the inference favorable to the party that prevailed in the trial court. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668. We must, therefore, conclude that the finding of the trial judge on the question of the right of the Grants to their free accommodations is properly supported and forecloses any argument here on that question of notice to the Hotel Company of claim of that right.

Appellants urge that the contract relied upon by Mrs. Grant is divisible, one part attempting to create an estate in real property, and the other part attempting to require the Hotel Company to furnish free service, food and refreshments. They further urge that if we assume the portion concerning the estate in real property can be supported, the other cannot.

This argument goes, first, to the sufficiency of the evidence to support that portion of the judgment giving Mrs. Grant the right to free service, food and refreshments. We have already detailed this evidence and regard it sufficient to support both phases of the contract. The same estoppel applies to the one as to the other.

[17] Secondly, it is argued that as the part of the contract which relates to hotel service, food and refreshments, requires personal service, it cannot be specifically enforced.

The reply to this argument is that the decree does not order the Hotel Company or any one else to furnish Mrs. Grant and her guests with hotel service, food and refreshments, not including intoxicating liquors. It merely declares her right to such service from the Hotel Company, free from interference on the part of the other defendants. This portion of the decree is merely declaratory and is neither mandatory nor prohibitory.

[18] A contract that cannot be specifically enforced may form the basis for other legal rights. Pimentel v. Hall-Baker Co., Cal.App., 90 P.2d 588; Norris v. Lilly, 147 Cal. 754, 82 P. 425, 109 Am.St. Rep. 188.

[19] Appellants urge that the finding that in 1914 Mrs. Grant purchased, from her husband, stock in the Hotel Company is not supported by the evidence. This

argument is based upon the failure to issue any stock certificate to Mrs. Grant for a number of years after that date.

In 1914 a stock certificate was merely evidence of the ownership of stock in a corporation, and stock then might be sold or assigned without the manual tradition of a certificate. The failure of Mrs. Grant to have issued to her a certificate for stock in the Hotel Company is not conclusive evidence that she had not purchased and did not own the stock. Young v. New Pedrara Onyx Co., 48 Cal.App. 1, 192 P. 55.

[20] Appellants urge that the judgment in this case is too uncertain to be understood or enforced in that it cannot be determined therefrom just what service, food and refreshments must be furnished and whom or how many of Mrs. Grant's guests must be served. We repeat that the judgment here is merely declaratory of the rights of the parties and is neither mandatory nor prohibitory. It is drawn in accordance with the construction put upon the contract for more than twenty years during which time it was understood and performed without any disagreement or friction. If it was so understood and satisfactorily performed over that period of time there should be no serious obstacle to satisfactory performance by giving the same quality of service, food and refreshments (exclusive of intoxicating liquors) in the future. The only cause of disagreement in the past was over furnishing an undue amount of liquors to Mrs. Grant after January 1, 1935. That cause of misunderstanding has been removed by the judgment which excludes intoxicants from the refreshments to be served.

[21] Appellants urge that the trial judge erred in admitting certain conversations between Mr. and Mrs. Grant when no representative of the Hotel Company, other than Mr. Grant, was present. We think this evidence should have been excluded for reasons already given. However, from what we have already said it appears that we regard those errors as harmless.

The judgment is affirmed.

I concur: BARNARD, P. J.

Mr. Justice GRIFFIN, being disqualified, does not participate herein.

---

33 Cal.App.2d 724

## Ex parte JACKSON.

Cr. 3247.

District Court of Appeal, Second District, Division 1, California.

July 21, 1939.

**1. Habeas corpus** ⚷53

Petition for writ of habeas corpus, which referred to city ordinance by citing only certain parts and provisions thereof with the general allegation that the quoted portions were in conflict with each other, and which did not present a copy of the ordinance in full, was insufficient to enable court to pass upon the validity of the ordinance.

**2. Evidence** ⚷32

The Court of Appeal cannot take judicial cognizance of city ordinances.

**3. Habeas corpus** ⚷54

The allegation in petition for writ of habeas corpus that certain sections of city ordinance were in conflict with section of Penal Code was insufficient to justify issuance of the writ, where the ordinance was not set out and court was not furnished with a copy thereof nor with a copy of the complaint on which petitioner was tried and convicted. Pen.Code, § 330a.

◆

Proceeding in the matter of the application of John Jackson for a writ of habeas corpus.

Petition and amended petition for the writ denied.

Maurice A. Gleason, of Los Angeles, for petitioner.

PER CURIAM.

[1, 2] The allegations contained in the petition and the amended petition for writ of habeas corpus this day filed in the above-entitled matter fail to state facts sufficient to justify the issuance of the writ. The ordinance of the city of Los Angeles No. 77,000 complained of in said petitions as being invalid and void and which is referred to by citing only certain parts and provisions thereof, with the general allegation that the quoted portions are in conflict with each other, cannot be passed upon by this court without a copy of the ordinance in full. This court cannot take judicial cognizance of city ordinances.

[3] The allegation that certain sections of ordinance No. 77,000 of the city of Los Angeles are in conflict with section 330a of the Penal Code is insufficient to justify the issuance of the writ for the reason that said ordinance is not set out and we are not furnished with a copy thereof, nor with a copy of the complaint on which defendant was tried and convicted.

The petition and the amended petition for the writ of habeas corpus are therefore both denied.

33 Cal.App.2d 717

**WHELAN v. BIGELOW et al.**

**Civ. 10955.**

District Court of Appeal, First District, Division 2, California.

July 21, 1939.

Rehearing Denied Aug. 19, 1939.

Hearing Denied Sept. 18, 1939.

**1. Automobiles** 🔑**242(4)**

In action for damages for injuries suffered by a boy six years of age who ran from behind truck parked on street into side of passing automobile, there being evidence that motorist was driving at a rate in excess of 25 miles an hour, the burden was on plaintiff to establish that operation of automobile at such speed constituted negligence.

**2. Automobiles** 🔑**245(47)**

In action for damages for injuries suffered by boy six years of age who ran from behind truck parked on street into side of passing automobile, under evidence that motorist was driving at a rate in excess of 25 miles an hour when view of pedestrian attempting to cross street was obstructed by truck, question of motorist's negligence was for jury. St.1931, p. 2120, § 113, subd. (a).

**3. Negligence** 🔑**136(29)**

The question of contributory negligence of a minor child is ordinarily a question of fact for jury.

**4. Automobiles** 🔑**245(74)**

In action for damages for injuries suffered by boy six years of age who ran from behind truck parked on street into side of passing automobile, question of contributory negligence of boy who was of normal intelligence, attended grade school, traversed streets four times a day, and had been warned not to cross avenue alone, was for jury.

**5. Trial** 🔑**296(3)**

In action for damages for injuries suffered by a minor who ran into side of passing automobile, an instruction that a motorist must anticipate that he may meet pedestrians on street and that he must keep a proper lookout and so operate his automobile as to prevent injuring them if possible was not erroneous when read in connection with other instructions.

**6. Damages** 🔑**132(1)**

$15,000 damages for personal injuries to a boy six years old, whose skull was fractured, causing a loss of seven-tenths of normal functions of left eye and impairment of vision of right eye and possible future mental derangement and whose face was permanently deformed, was not excessive.

**7. Automobiles** 🔑**245(62)**

In action for damages for injuries suffered by a minor who ran from behind truck parked on street into side of passing automobile, evidence as to whether negligence of truck driver in parking truck so that it unduly projected into street was a proximate cause of accident was sufficient for jury, where accident occurred within 6 or 8 feet of rear end of truck.

**8. Trial** 🔑**260(8)**

In action for damages for injuries suffered by a minor who ran from behind truck parked on street into side of passing automobile, refusal of an instruction requested by owner of truck that if negligence of motorist was sole and proximate cause of accident then truck owner was not liable was harmless error where substance of requested instruction was given, and one form of verdict submitted to jury would have exonerated truck driver.

◆

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Action for damages for injuries suffered from being struck by an automobile while crossing street by Edward Whelan, a minor, by his guardian ad litem, Josephine Whelan, against Ludovico Bigelow, James K. Bigelow, Effie L. Bigelow (his wife), and the City Ice Delivery Company (a corporation). From a judgment for plaintiff, the defendants appeal.

Affirmed.

Burbank & Laumeister, of San Francisco, for appellant City Ice Delivery Co.

Redman, Alexander & Bacon, of San Francisco, for appellants Bigelow.

Dean Cunha and Daniel R. Shoemaker, both of San Francisco, for respondents.

Hearing denied; EDMONDS, J., dissenting.

STURTEVANT, Justice.

The plaintiff, a minor, by his guardian, sued to recover damages for personal injuries. The jury returned a verdict in favor of the plaintiff against all of the defendants and they have appealed from the judgment.

The accident occurred on the east side of Ninth avenue between California and Lake streets. The two streets last named run east and west, the avenue runs north and south. At about noon on the 9th day of March, 1932, the plaintiff, a boy of about six years of age, had been on the sidewalk on the east side of Ninth avenue, at a point approximately in the middle of the block. That sidewalk was in front of the hospice occupied by the Volunteers of America. The premises are fifty feet six inches wide. In front of the hospice there were two or more automobiles parked in the avenue immediately adjacent to the sidewalk. A truck owned and operated by City Ice Delivery Company was also parked in front of said premises. The pleadings admitted that it was unlawfully parked. However, the exact spot in which it was located is one of the disputed facts in the case and will hereinafter be discussed. Ludovico Bigelow, a minor girl, the daughter of James K. Bigelow and Effie L. Bigelow, his wife, was driving a Ford coupe and had been to the branch library. She was returning to her home. She drove from California street north toward Lake street on the right hand side of Ninth avenue until she came to the truck. There was evidence that the truck was so located that the westerly side thereof stood out in the avenue twelve feet or more from the curb. It was facing to the south. On approaching the truck Miss Bigelow swerved slightly to the left and continued forward, the space between her car and the truck being approximately one foot. Immediately prior to passing the truck her view was wholly obstructed as to objects immediately north of the truck. As she drove forward and came about even with the rear end of the ice truck she saw the plaintiff, "a flash of brown", come against the side of the fender on the right hand side of the front of her car. She was not positive but she thought the plaintiff was running. Without conflict the evidence shows that when the plaintiff hit the side of the car his body fell back into the avenue, it was not dragged, and the automobile did not run over it. There was evidence that the point of contact in the street was three or four feet out from the westerly side of the truck and five or six feet back from the rear end of the truck. When Miss Bigelow saw the flash of brown she slammed on her brakes and the wheels cut into the pavement making two marks, one thirty-one feet long and the other one thirty-three feet long extending to within approximately two feet of a manhole that is located on about the middle line of Ninth avenue and about on the northerly line of the hospice if said line is extended. Miss Bigelow's car crossed the manhole and continued thirty or forty feet to the north and then came to a full stop.

As Miss Bigelow came from the south, she testified she was traveling about twenty miles an hour. Mr. Beggs, a pedestrian walking south on the westerly sidewalk from Lake street toward California street, was looking at the car and testified, at least in one part of his testimony, that the car was traveling twenty-five to thirty miles an hour. The avenue is forty feet wide and it was stipulated that the place of the accident is a residence district.

When the plaintiff fell over into the street, blood commenced to flow from the wounds on his head and a pool of blood accumulated before the body was picked up. A few minutes after the plaintiff had been taken to the hospital the blood was washed up, but that left a wet spot the location of which was testified to by various witnesses. They did not exactly agree in their testimony as to its location, however all agree that the spot was near the manhole. No single witness testified that he made a measurement. A diagram, drawn to a scale, was used on the trial. Some witnesses placed marks on it locating the spot. One mark indicates a distance of two feet southeast, another one indicates a distance of three feet south-southeast, and another mark indicates nine feet south-southeast, from the center of the manhole.

As to the location of the truck, there is a great deal of conflict in the evidence. There was some evidence that it was double-parked and that the rear end was almost opposite the front entrance to the hospice. There was some evidence that it was not parked parallel to the curb but at an angle. Again there was evidence that it was parked from twenty to twenty-five feet further south.

In accordance with the provisions of section 62 of the statute (2 Deering's Gen. Laws 1931, Act 5128, p. 2476) the father and mother of Miss Bigelow signed her application for an operator's license. They were made parties defendant. The father, mother, and daughter appealed from the judgment. City Ice Delivery Company, a corporation, also appealed. We will now discuss those appeals separately.

### The Bigelow Appeal.

[1, 2] The defendants Bigelow contend the evidence does not support the implied finding of the jury that Miss Bigelow was negligent. That she was driving on the proper side of the highway is not disputed. However, there is much conflict in the evidence regarding her speed being lawful and regarding the rate being prudent at the particular time and place of the accident. There was some evidence to the effect she was driving in excess of twenty-five miles an hour, that being so, the burden rested on the plaintiff to establish that the operation of her car at such speed constituted negligence. As shown above, the plaintiff introduced evidence on that subject. The jury found the facts against the defendants. We may not say those implied findings are not sustained. Furthermore, Miss Bigelow, at the particular time and place, was bound to "* * * drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." (Stats.1931, p. 2120, § 113, subd. (a). Bearing in mind the facts hereinabove recited, we think it is clear that the plaintiff presented and was entitled to have the jury pass on the question as to whether or not the rate of speed of Miss Bigelow's car was, at the particular time, in violation of the provisions of the statute just quoted. That her view was obstructed immediately before passing the rear end of the truck is a conceded fact. Under any view of the evidence she was driving at such a rate of speed that when she saw the danger she applied her brakes, her car ran fifteen or twenty feet, the collision occurred, the car ran ten or fifteen feet further with the brakes still set, and then it ran fifteen to thirty feet further before coming to a stop. These conclusions are shown by the physical facts and supported by testimony. It will be conceded at once that the record contains evidence at variance with the evidence which we have hereinabove set forth. But the assertion of these defendants that there was no evidence to support an implied finding may not be sustained.

[3, 4] In the next place these defendants assert that the plaintiff was guilty of contributory negligence as a matter of law. They concede the general rule is that the question of contributory negligence of a minor child is ordinarily a question of fact for the jury. However, it is their claim that the record shows the plaintiff was six years and two months of age; that he was a normal child of normal intelligence; that he attended a grade school and traversed the streets four times a day; and that he had been warned by his mother not to cross the avenue alone. Such facts show he was an ordinary child, but do not at all show that as a matter of law he was to be taken out of the operation of the ordinary rule applicable to a charge of contributory negligence.

[5] Acting upon the request of the plaintiff, the trial court instructed the jury, "A driver of an automobile is bound to anticipate that he may meet pedestrians on the street. He must keep a proper outlook and so operate his car as to prevent injuring them if after the exercise of due care on his part it is possible to do so." They then assert that said instruction placed upon Miss Bigelow the unqualified duty of anticipating the presence of the child in the street as a pedestrian. However, when the instruction objected to is read in connection with the other instructions given by the trial court we find no valid objection thereto.

[6] These three defendants contend that $15,000, the amount of the verdict, was excessive. The doctor who treated the plaintiff was called as a witness and made a full statement regarding the treatment that had been necessary and the results. The plaintiff's skull was fractured. It became necessary to operate and remove particles of bone and drain out the accumulated pus. After a time the wound was healed. As a result of the fracture, the plaintiff has suf-

fered the loss of seven-tenths of the normal functions of the left eye and definite impairment to the right eye. His face is permanently deformed. Furthermore, the effect of the fracture has caused mental derangement in the past and the possibility of more in the future. He has been directed by his doctor not to participate in active sports. If he gets highly excited, he is apt to go into tantrums. In the past the doctor has been compelled to prescribe a sedative for the plaintiff and the doctor is of the opinion it will always be necessary for plaintiff to take some kind of a sedative. Under these circumstances a court of review may not say the verdict was so plainly and outrageously excessive as to suggest at first blush passion, or prejudice, or corruption on the part of the jury. Reneau v. Hirsch, 88 Cal.App. 1, 6, 262 P. 1100.

Appeal of City Ice Delivery Company.

[7] The defendant, City Ice Delivery Company, also contends that the verdict was not supported by the evidence. It quotes from the reporter's transcript evidence to the effect that its truck was parked from twenty-seven and a half to forty-five feet south of the place where the impact occurred. It argues that, conceding it was negligent, nevertheless such negligence was remote and was not a proximate cause of the accident. We think the point may not be sustained. Conceding there was a conflict in the evidence, it is very clear there was evidence to the effect that the distance between the rear end of the truck and the point of impact was not more than six or eight feet. The direct evidence shows it was impossible that the distance should have been forty-five feet. There were only two eye witnesses, Miss Bigelow and Mr. Beggs. Without regard to where the truck stood, both of those witnesses assert the impact took place very close to the rear end of the truck. Again, freely conceding the conflict in the evidence, this court may not say the verdict of the jury against this defendant is not supported by the evidence.

[8] The defendant contends it was entitled to have instructions given presenting its theory of the case to the jury. We do not understand that the plaintiff controverts that contention. The defendant requested two instructions which the trial court refused to give. They were to the general effect that if the negligence of Miss Bigelow was the sole and proximate cause of the accident then the City Ice Delivery Company could not be held. Both instructions were correct statements of the law. But, so were the following instructions which were given:

"You are instructed that no defendant may be held liable in this case unless it appears from the evidence, first, that such defendant was guilty of some negligence, and second, that such negligence, if any, was the proximate cause of the injury to plaintiff; and, third, that plaintiff himself was free from contributory negligence.

"Notwithstanding the fact that this action has been brought against several defendants, you are nevertheless not entitled to return a verdict against a defendant or defendants against whom no liability has been established regardless of what verdict you return as between plaintiff and any other defendant or defendants."

Furthermore, the trial court caused to be handed to the jury four separate forms of verdict. One of those forms would have been a verdict completely exonerating this defendant; however, the jury did not choose to adopt it. Under these circumstances we think it is clear the substance of the two instructions which the defendant claims should have been given was given, and that this defendant was not prejudiced by the refusal.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

## SLEMONS et al. v. PATERSON et al.*

Civ. 10901.

District Court of Appeal, First District.
Division 2, California.
July 20, 1939.

Hearing Granted Sept. 18, 1939.

**1. Appeal and error 🔑110**

An order granting plaintiffs' motion for a new trial was an "appealable order." Code Civ.Proc. § 963.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

**2. Appeal and error 🔑113(1), 782**

An order denying defendants' motion to vacate an order granting plaintiffs' motion for new trial was not an "appealable order," and hence an appeal from such order would be dismissed.

**3. Appeal and error 🔑106, 782**

An order denying defendants' motion for an order directing the clerk to enter nunc pro tunc as of a certain date an oral stipulation of plaintiffs' attorney waiving notice of entry of judgment was not an "appealable order," and hence appeal from such order would be dismissed.

**4. Appeal and error 🔑113(1), 782**

An order denying defendants' motion to vacate an order, made by the trial court on its own motion, correcting the record as to the date of an order granting plaintiffs' motion for new trial, was not an "appealable order," and hence appeal from such order would be dismissed.

**5. Appeal and error 🔑106, 782**

An order granting plaintiffs' motion to strike a stipulation from the files was not an "appealable order," and hence appeal from such order would be dismissed.

**6. New trial 🔑155**

Defendants' contention that an order granting plaintiffs' motion for new trial was not made until date upon which such order was entered of record by trial court, and that trial court had lost jurisdiction to grant the motion because order was not made until more than 60 days after plaintiffs had filed their notice of intention to move for new trial, could not be sustained where order granting motion had been pronounced within the 60-day period but not entered of record until after the expiration of such period. Code Civ.Proc. § 660.

**7. New trial 🔑163(1)**

A trial court had the right of its own motion to cause its minutes to be amended to speak the truth as to date upon which an order granting a motion for new trial was made.

**8. Appeal and error 🔑948**

District Court of Appeal would not disturb trial court's order granting plaintiffs' motion for new trial on ground that trial court had abused its discretion and that plaintiffs had failed to make a showing that they could not with reasonable diligence have discovered and produced, at trial, the newly discovered evidence where defendants failed to clearly show an abuse of discretion by trial court; there being a presumption that trial court had properly exercised its discretion and such presumption was required to be overcome by a clear want of facts before trial court's order would be disturbed.

**9. New trial 🔑150(1)**

A motion for a new trial for newly discovered evidence must be made on affidavits. Code Civ.Proc. § 657, subd. 4; § 658.

**10. Affidavits 🔑9**

Whenever a statute, either in express terms or by implication, requires a person to make a statement which from the very nature of things can only be made on information and belief, an affidavit in that form meets the demands of such statute.

**11. New trial 🔑150(2)**

Where defendants set up the statute of limitations as a defense, proof, offered by plaintiffs in support of their motion for new trial for newly discovered evidence, consisting of a joint affidavit alleging that plaintiffs had interviewed certain persons and had been informed that defendants were absent from state and that such absences fell within period which defendants claimed the statute of limitations ran, was competent. Code Civ.Proc. § 337, subd. 1; § 657, subd. 4; § 658.

**12. New trial 🔑140(1)**

Defendants' claim that judgment was a consent judgment, and hence that plaintiffs' motion for new trial should have been denied, could not be sustained where notice of intention to move for new trial was based on statutory grounds and was supported by affidavit of plaintiffs and opposed by affidavits of defendants and such affidavits did not claim that judgment was by consent and

---

*For subsequent opinion see 96 P.2d 125.

**record did not disclose matters tending to show judgment was by consent. Code Civ. Proc. § 657, subd. 4; § 658.**

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Alice M. Slemons and J. W. Slemons, her husband, against Laura C. Paterson and Malcolm G. Paterson, her husband, to obtain a deficiency judgment after having caused to be made a sale of real estate under a trust deed. From orders granting plaintiffs' motion for new trial, denying defendants' motion to vacate the order granting the motion for new trial, denying defendants' motion for an order directing the clerk to enter nunc pro tunc as of February 14, 1938, an oral stipulation of plaintiffs' attorney waiving notice of entry of judgment, denying defendants' motion to vacate an order made by the trial court of its own motion, and granting plaintiffs' motion to strike a stipulation from the files, defendants appeal.

Order granting new trial affirmed, and appeals from the other orders dismissed.

K. R. McDougall, of Palo Alto, for appellants.

Charles H. Sooy and Charles D. Sooy, both of San Francisco, for respondents.

STURTEVANT, Justice.

[1-5] The plaintiffs commenced an action against the defendants to obtain a deficiency judgment after having caused to be made a sale of real estate under a trust deed. The defendants answered and among other things set up a defense of the statute of limitations. Section 337, subd. 1, Code Civ.Proc. The parties entered into a stipulation which by its terms should not have been filed. Nevertheless it was filed May 26, 1938. Judgment was ordered in favor of the defendants. The plaintiffs made a motion for a new trial. On April 19, 1938, in open court, the trial court made an order granting the motion. That order was not entered until April 26, 1938. On May 10, the trial court having the matter called to its attention, of its own motion made an order correcting the record to make it speak the truth and showing said order to have been made April 19, 1938. Afterwards cross-motions were made. The plaintiffs made a motion that the said stipulation be stricken from the files and that they be relieved from the force and effect thereof. That motion was granted. The defendants made a motion that the order granting a new trial be vacated. That motion was denied. The defendants have filed purported appeals from (1) the order granting plaintiffs' motion for a new trial; (2) the order denying defendants' motion to vacate said order; (3) the order denying defendants' motion for an order directing the clerk to enter nunc pro tunc as of February 14, 1938, the oral stipulation of plaintiffs' attorney waiving notice of entry of judgment; (4) the order denying defendants' motion to vacate the order made by the court of its own motion; and (5) the order granting plaintiffs' motion to strike the stipulation from the files. The appeal first mentioned was from an appealable order (Code Civ.Proc. § 963), and will hereinafter be discussed. The other orders are not appealable orders (2 Cal.Jur. 163), and the appeals are dismissed.

[6, 7] The defendants claim the order granting a new trial was not made until April 26, 1938, that is, more than sixty days after plaintiffs filed their notice of intention to move for a new trial, and that at that time the trial court had lost jurisdiction. Code Civ.Proc., § 660. We find no merit in the contention of the defendants. Under the facts the correct date of the court's order was April 19, 1938, the date of the pronouncement thereof. United Railroads v. Superior Court, 197 Cal. 687, 242 P. 701. Furthermore, under the facts the trial court had the right to cause its minutes to be amended to speak the truth and its order dated May 10, 1938, was likewise correct. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138.

[8] The defendants also contend that, in making the order, the trial court abused its discretion. They contend that the plaintiffs made no showing that they could not with reasonable diligence have discovered and produced at the trial the newly discovered evidence. They cite and rely on a number of cases in which an order denying a motion for a new trial was involved. Those cases are not in point. In Mowry v. Raabe, 89 Cal. 606, 27 P. 157, the facts relied on by the moving party were not newly discovered. In Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411, the newly discovered evidence on which the moving party relied was merely cumulative and was testimony to be given by the employees of the moving party. Authorities more directly in point

are Heintz v. Cooper, 104 Cal. 668, 38 P. 511, Blewett v. Miller, 131 Cal. 149, 63 P. 157, and Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712. In the case first cited the court was considering an appeal from a motion granting a new trial. There, as here, it was earnestly contended that there was no sufficient showing of diligence. Commencing on page 669 of 104 Cal., 38 P. at page 512, Mr. Justice Van Fleet, speaking for the court, said: "'Diligence' is a relative term, incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. *The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed.* See Jones v. Singleton, 45 Cal. 92; Baker v. Joseph, 16 Cal. [173] 180; Kenezleber v. Wahl, 92 Cal. 202, 28 P. 225. *There is no such want in the showing made here.*" (Emphasis ours.)

[9-11] As another subdivision of the last point the defendants contend the proof offered by the plaintiffs in support of their motion was incompetent. Said proof consisted of the joint affidavit of the plaintiffs. Therein they alleged they had interviewed the employer of the defendant, Malcolm G. Paterson, and they were informed by said employer that Mr. Paterson was in New York for twelve weeks. They also alleged they had interviewed Mrs. West, the landlady of the defendants, and by her they were informed Mrs. Paterson was in Arizona for forty days. They also alleged that said absences fell within the period which said defendants claimed the statute of limitations ran. The plaintiffs' motion was based on section 657, subd. 4, of the Code of Civil Procedure. When a motion for a new trial is based on that subdivision it must be made on affidavits. Section 658, Code Civ.Proc. In Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977, the court was considering an appeal from an order denying a motion to change the venue. That motion was made on affidavits. There, as here, it was contended the affidavits were incompetent. On page 520 of 206 Cal., 274 P. at page 979 the court quoted with approval as follows: "'Whenever the statute, either in express terms or by implication, requires a person to make a statement which from the very nature of things can only be made on information and belief, an affidavit in that form meets the demands of the statute. It is impossible for anyone to swear positively that a particular person is a nonresident of this state, or to say that a nonresident resides at a particular place. In requiring these facts to be stated, the statute does not demand the impossible. * * * It does intend that the person making the affidavit * * * shall state these facts upon information and belief—the only possible ground upon which they can be made.' Smith v. Collis, 42 Mont. 350, 363, 112 P. 1070, 1073, (Ann. Cas.1912A, 1158), Leigh v. Green, 64 Neb. 533, 90 N.W. 255, 101 Am.St.Rep. 592."

[12] The defendants make some showing to the effect that the judgment was a consent judgment and therefore a motion for a new trial should have been denied. The record does not support them. The notice of intention to move for a new trial was based on the statutory grounds. It was filed February 23, 1938. It was supported by the affidavit of the plaintiffs. In opposition the defendants filed two affidavits of their attorneys, the affidavit of Mrs. Paterson, the affidavit of Margaret K. Hunter, the affidavit of Eva E. Wuestefeld and the affidavit of A. M. Lester. In rebuttal the plaintiffs filed the affidavit of their former attorney. Those instruments are silent on the claim that the judgment was by consent. The record does not disclose that any other evidence was presented to the trial court on the hearing of the motion for a new trial. As noted above the trial court granted the motion on April 19, 1938. True it is that the record contains a stipulation stated in the briefs to have been entered into December 20, 1937. But that stipulation did not appear in the record until May 26, 1938, and there is nothing to show it was before the trial court when the motion for a new trial was made.

The order granting a new trial is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

## FOSTER v. HUDSON.

## BAKER v. SAME.

Civ. 6167, 6168.

District Court of Appeal, Third District, California.

July 20, 1939.

Rehearing Denied Aug. 19, 1939.

As Corrected Sept. 26, 1939.

**1. Continuance 🔑7**

The trial court has wide discretion in the granting or denial of a motion for a continuance.

**2. Continuance 🔑34, 51(4)**

Refusal of trial court to grant defendant in action arising out of automobile accident a further continuance was not abuse of discretion, though defendant was absent from state, where several extensions had previously been procured by defendant, five months had elapsed between service of summons and complaint on defendant and time defendant left state, and counsel for plaintiffs stipulated that any statement by defendant might be introduced in evidence or that defendant's counsel might introduce any statement drawn by them, which should be considered as a statement of their client.

**3. Damages 🔑130(3)**

$4,000 to motorist for injuries consisting of wrenched neck, which caused considerable pain at time but which cleared up in a few weeks, and internal injury to digestive tract which would cause discomfort for years, and an injury to cartilage of left knee, which could be expected to cause trouble indefinitely, was not excessive.

**4. Damages 🔑132(1)**

$10,000 to guest in automobile struck by defendant for injuries consisting of having all teeth knocked out, together with a portion of the lower jawbone, a perforated lower lip, a deep cut on tongue, and a portion of his scalp torn off, was not excessive.

**5. Appeal and error 🔑1004(1)**

Only where a judgment in a personal injury case is so grossly excessive as to shock the conscience is an appellate court justified in intervening.

**6. Damages 🔑143**

In personal injury action, a plaintiff is not required to allege specifically each physical injury sustained or which may have resulted from alleged accident, but it is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury.

**7. Pleading 🔑19**

A special demurrer to allegation, in complaint in personal injury action, "that the foregoing are not all the injuries sustained by plaintiff * * *," on ground that language was ambiguous, was properly overruled as frivolous, since plaintiff was not required to allege specifically each physical injury sustained or which might have resulted from the accident.

**8. Appeal and error 🔑1032(1)**

That trial court drew jury from a special venire without having recourse to the general panel did not constitute reversible error in absence of showing that appellant was prejudiced thereby. Code Civ.Proc. § 226.

**9. Jury 🔑70(1)**

While the better practice is to use jurors whose names are drawn from the term trial box, the trial court has discretion to order a special venire, as provided in statute, notwithstanding that there are sufficient names in the term trial jury box. Code Civ.Proc. § 226.

**10. Automobiles 🔑243(1)**

In action for injuries arising out of automobile accident, evidence offered by defendant that he was at time of trial convalescing in another state was properly refused as being irrelevant.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Consolidated actions by Joe Foster against R. L. Hudson, and by Herman Baker against the same defendant, for injuries arising out of an automobile accident. From judgments for the plaintiffs, the defendant appeals.

Judgments affirmed.

Charles V. Barfield, L. L. Bernheim, and John H. Healy, Jr., all of San Francisco, and Andrew R. Schottky, of Mariposa, for appellant.

C. Ray Robinson, Willard B. Treadwell, and James D. Garibaldi, all of Merced, for respondents.

BRUTON, Justice pro tem., delivered the opinion of the court.

The above actions arose out of the same automobile accident. They were consolidated for trial and for this appeal, and will be considered together in this opinion.

The accident in question occurred about ten o'clock p. m. on November 24, 1937, on Highway 99 in Merced county. The plaintiffs Joe Foster and Herman Baker, together with a Mr. Ewing, were in a coupe driving northward. Immediately preceding the accident, the plaintiffs observed two cars approaching from the north, one of which passed the other, and instead of swinging back to its right side of the highway, continued diagonally across the pavement to its left side of the highway. Foster, who was driving the coupe, upon observing that the approaching car was not returning to its right side of the highway, slackened his speed and pulled off of the pavement to his right, where the approaching machine, which was driven by defendant Hudson, collided with his (Foster's) car in a head-on collision.

Plaintiff Baker had ten teeth knocked out, all that he had, together with a portion of the lower jawbone in which they were imbedded, his lower lip perforated, a deep cut in his tongue and a portion of his scalp torn off. Plaintiff Foster received a wrenched neck, which caused considerable pain at the time, but which cleared up in a few weeks; an internal injury to the digestive tract, which will cause discomfort for a period of years, and an injury to the cartilage of the left knee, which causes occasional locking of the joint, and may be expected to cause some difficulty for an indefinite period.

The cases were tried before a jury, which returned a verdict in favor of plaintiff Foster for $5,500, and in favor of plaintiff Baker for $15,000. These amounts were reduced by the court to $4,000 and $10,000, respectively.

Appellant presents six specifications of error. They are:

1. The trial court abused its discretion in refusing defendant's motions for a continuance.

2. The judgments are excessive in amount.

3. Certain instructions were erroneous.

4. Defendant's special demurrer was improperly overruled.

5. Defendant's objection to the jury panel was erroneously overruled.

6. The court erred in refusing to permit defendant to introduce evidence showing the reason for his absence.

[1,2] As to appellant's first specification of error, these cases were filed January 7, 1938. Between that day and April 29, 1938, when he filed his answer, defendant filed a demurrer, and received four extensions of time within which to plead. On May 2, 1938, the cases were set for trial for July 5, 1938. On June 18, 1938, defendant filed his motion for a continuance until after August 5, 1938. This motion was denied, but was renewed and again denied at the time of trial. Affidavits were filed showing that appellant had left the state on May 1, 1938, without having consulted with his attorneys, and at the time of trial was in Missouri recovering from an operation for a rupture. There is nothing better settled than that a trial court has a wide discretion in the granting or denial of a motion for a continuance. There were four extensions of time procured by defendant, excluding the interposition of a pointless demurrer. Five months elapsed between the service of the summons and complaint on appellant and the time that he left the state. During that time he could have, if he had so desired, fully prepared his defense.

Counsel for plaintiffs stipulated that any statement by defendant might be introduced in evidence or that defendant's counsel might introduce any statement drawn by them, which should be considered as a statement of their client. These offers were refused by counsel for defendant. The motions for continuance were properly denied.

[3-5] Appellant's second point that the judgments were excessive in amount is without merit. Both plaintiffs received injuries of a serious and continuing character, particularly plaintiff Baker. It is only where a judgment in a personal injury case is so grossly excessive as to shock the conscience that an appellate court is justified in intervening. Such a case is not here presented.

[6,7] Appellant's third contention is likewise without merit. Appellant complains that three instructions, which it is not necessary to review, were erroneously given. These instructions have been approved many times by the appellate and supreme courts of this state, and are an accurate statement of the law. Appellant was not prejudiced thereby.

Appellant's fourth specification of error is that his special demurrer was erroneously overruled. After enumerating certain specific injuries, each of the complaints contained the following language: "That the foregoing are not all the injuries sustained by plaintiff * * *." Appellant's complaint is, that the language quoted is ambiguous.

"A plaintiff is not required to allege specifically each physical injury sustained or which may have resulted from the accident. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury." Kuhns v. Marshall, 44 Cal.App. 588, 186 P. 632, 633.

The demurrer was frivolous.

[8, 9] Appellant, as his fifth specification of error, urges that the trial court erroneously drew the jury from a special venire without having recourse to the general panel. Our attention has not been drawn to any California case where such a procedure has been held to be reversible error. The provisions of section 226 of the Code of Civil Procedure are sufficiently broad to permit the procedure followed here in the absence of a showing that appellant was prejudiced thereby.

"The better practice is to use jurors whose names are drawn from the term trial jury box. * * * It is well established, however, that the court had discretion to order a special venire, as provided in section 226, Code of Civil Procedure, notwithstanding the fact that there are sufficient names in the term trial jury box." Estate of Wall, 187 Cal. 50, 200 P. 929, 930.

[10] We have already decided that the trial court properly denied appellant's motions for a continuance. This, in effect, disposes of appellant's sixth specification of error, which is that the court should have admitted evidence offered by defendant that he was at the time of trial convalescing in the state of Missouri.

As already pointed out, the appellant voluntarily absented himself from the state at the time his case was ready to go to trial. He did not trouble himself to submit his testimony in the form of a deposition, or otherwise, or even to consult with his attorneys. If he did not elect to concern himself with his own case that of course was his own affair. However, the condition of his health during his stay in Missouri was not relevant to any issue in these cases then before the trial court.

The judgments are affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

---

36 Cal.App.2d Supp. 745

## MEDICAL FINANCE ASS'N v. SHORT.

Civ. A 4312.

Appellate Department, Superior Court,
Los Angeles County, California.
July 21, 1939.

**1. Exemptions 🔑68**

In proceedings supplemental to execution, debtor was required to pay one-half of a check for $47.50, which was in her possession, and which had been received as salary from the Works Progress Administration, in partial satisfaction of a judgment based on a necessary of life, although money may have been needed by debtor for support of herself and family. Code Civ. Proc. § 690.11; § 690.22, as amended by St. 1937, p. 1502, § 1; § 715.

**2. Constitutional law 🔑70(3)**

Whether money received as wages by woman employee of Works Progress Administration should be wholly exempt from execution is a matter of policy which must be determined by legislative rather than judicial branch of government. Code Civ. Proc. § 690.11; § 690.22, as amended by St 1937, p. 1502, § 1.

**3. Exemptions 🔑4**

The courts may not sanction claims of exemption from execution not created by statute. Code Civ.Proc. § 690.11; § 690.22, as amended by St.1937, p. 1502, § 1.

**4. Execution 🔑368, 402**

In proceedings supplemental to execution, salary owing to a judgment debtor by federal government could not be reached by a judgment creditor; but, when judgment debtor received salary check, court could order her to apply one-half of check in partial satisfaction of judgment based on a necessary of life. Code Civ.Proc. § 690.11; § 690.22, as amended by St.1937, p. 1502, § 1; § 715.

5. **Execution** ⚷405

In proceedings supplemental to execution, court could appoint a receiver to secure conversion of a salary check in possession of judgment debtor, into legal tender, and application of one-half thereof toward satisfaction of a judgment based on a necessary of life. Code Civ.Proc. § 690.11; § 690.22, as amended by St.1937, p. 1502, § 1; § 715.

Appeal from Municipal Court of City of Long Beach; Oscar E. Houston, Judge.

Proceedings by Medical Finance Association against Helen Short to compel defendant to apply in partial satisfaction of a judgment certain moneys in her possession. From an order dismissing proceedings, plaintiff appeals.

Reversed with directions.

Marshall & Farnham, of Long Beach, for appellant.

Helen Short, pro se.

SCHAUER, Judge.

Plaintiff, having an unsatisfied judgment for a necessary of life (medical services) against defendant Helen Short, cited her to appear for examination in proceedings supplemental to execution pursuant to the provisions of section 715 of the Code of Civil Procedure (the material portions of said section 715 are quoted in Medical Finance Association v. Karnes, Cal.Super., 1938, 84 P.2d 1076), whereupon it developed that she was employed as a Works Progress Administration administrator at a salary of $95 per month, payable semimonthly, and that she then (February 17, 1939) had in her possession and under her control a check in her favor, payable February 15, 1939, in the sum of $47.50 due her for services rendered during the preceding one-half month. Besides herself, defendant, from such earnings, and having no other means, was supporting a minor brother and contributing to the support of her mother. The court refused to order any portion of the sum represented by the check to be applied toward the satisfaction of the judgment and dismissed the proceeding. Plaintiff appeals; the order must be reversed.

[1-3] The money was due defendant not "as a pension, or retirement or disability or death or other benefit" (Sec. 690.22, Code of Civil Procedure, as amended by St.1937, p. 1502, § 1) but as wages (Hammond v. Hoskins, 1938, 30 Cal.App., Supp., 2d 779, 79 P.2d 1116), and, although it may in fact have been needed by defendant for the support of herself and family, one-half of such earnings was subject to execution, since the judgment against her was based on a necessary of life (Sec. 690.11, Code of Civil Procedure). Whether money received as wages by one employed under the Works Progress Administration should be wholly exempt from execution is a matter of policy which must be determined by the legislative, rather than the judicial, branch of government. The courts may not sanction claims of exemption not created by statute. Security-First Nat. Bank v. Pierson, 1934, 2 Cal.2d 63, 65, 38 P.2d 784; Wade v. Rathbun, 1937, 23 Cal.App., Supp., 758, 761, 67 P.2d 765.

[4, 5] Although the intangible credit could not be reached by plaintiff in such a proceeding as this while it remained a mere debt due from the government to defendant (Medical Finance Ass'n v. Karnes, Cal.Super., 1938, 84 P.2d 1076), it became available and amenable to control of the court when its status and character were changed to the extent of its becoming tangible property in the actual possession and control of defendant, i. e., when she received the check. If necessary or expedient in securing the conversion of the check into legal tender and the application of one-half thereof toward satisfaction of the judgment, the court may appoint a receiver for that purpose. McCutcheon v. Superior Court, 1933, 134 Cal.App. 5, 3, 9, 24 P.2d 911; Bruton v. Tearle, 1936, 7 Cal. 2d 48, 53, 59 P.2d 953, 106 A.L.R. 580.

The order of the court discharging defendant from the supplemental proceeding is reversed with directions to proceed in a manner not inconsistent with this opinion, appellant to recover its costs of appeal.

We concur: SHAW, P. J.; BISHOP, J.

14 Cal.2d 119

## HAMES et al. v. RUST et al.

Sac. 5264.

Supreme Court of California.

Aug. 1, 1939.

**1. New trial ⇐71**

In action to quiet title to mining property claimed by plaintiff under contract of purchase and by defendant as assignee of a prior lease with option to purchase, wherein controlling issue was whether owner had waived and excused admitted default of defendant, granting of plaintiff's motion for new trial on ground of insufficiency of evidence was not an abuse of discretion where evidence was conflicting and testimony of owner on issue of waiver was inconsistent and contradictory.

**2. New trial ⇐71**

A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence.

**3. Appeal and error ⇐979(2)**

Where trial court grants motion for new trial on ground of insufficiency of evidence, appellate court will interfere only in rare cases showing abuse of discretion, since trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom.

**4. New trial ⇐68, 71**

A trial court cannot be held to have abused its discretion in granting motion for new trial on ground of insufficiency of the evidence, where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party.

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by J. T. Hames and Jett A. Hames against John A. Rust and others and the Deer Creek Union Mining Company to quiet title to mining property. From an order granting plaintiffs' motion for new trial on ground of insufficiency of the evidence, defendant Deer Creek Union Mining Company appeals.

Order affirmed.

Busick & Busick, of Sacramento, for appellant.

H. Ward Sheldon, of Nevada City, for respondents.

PER CURIAM.

Defendant Deer Creek Union Mining Company appeals from an order granting a new trial to the plaintiffs on the ground of insufficiency of the evidence.

The action is one to quiet title in and to certain mining property. It appears that the plaintiffs claim an interest in the property by reason of a contract of purchase entered into with the owner Nihell on October 29, 1937, which contract amended or superseded an earlier contract substantially to the same effect and bearing date June 21, 1937. The interest of the defendant mining company in the property arises under a lease with option to purchase also executed by Nihell as owner on or about October 27, 1934, and thereafter assigned by the lessees therein named to the defendant mining company. As shall later appear, plaintiffs' contract made reference thereto. Inasmuch as the instrument under which the defendant mining company asserts its adverse claim antedates by several years the plaintiffs' interest in the property, the former would take priority unless, as alleged and contended by the plaintiffs, the defendant has defaulted in the performance of the conditions specified in its agreement and has lost and forfeited all rights thereunder. At the conclusion of the trial, the court below found that the defendant mining company had defaulted in the performance of its obligations under its lease in that it had ceased to operate the property for a continuous period in excess of thirty days and also had failed to make the instalment payments required of it. But, the court went on to find that the owner Nihell had thereafter granted to the defaulting defendant an extension of time within which to perform the terms and conditions of its contract and that its rights in and to the property had not therefore been forfeited or terminated. However, as already indicated, the court below subsequently granted the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence, the propriety of such order being challenged upon this appeal by the defendant mining company.

Examination of the entire record, including the evidence, definitely indicates that default had occurred in the defendant's performance under its agreement.

Therefore the rights of the litigants in and to the property must turn ultimately upon the issue whether the owner Nihell had waived and excused the defendant's default by granting an extension of time. The evidence addressed to this point is decidedly unsatisfactory and in many instances conflicting which fact undoubtedly prompted the court below, in the exercise of its discretion, to grant the plaintiffs' motion for a new trial. As shall presently appear, the attitude of the owner Nihell is difficult to comprehend for after he had entered into agreements covering the same property with both sides to this controversy he undertook to and did collect moneys from each when he must have known that the interests of one were necessarily adverse to the other and that collections could only properly be made from one.

Illustrative of the unsatisfactory and conflicting nature of the evidence touching the waiver issue, is the unequivocal declaration by the owner Nihell in the plaintiffs' contract of purchase to the effect that the defendant mining company was "in default" under its agreement and that as owner he had given "written notice of such default and believes that said contract is of no further force and effect * * *".

While on the witness stand the plaintiff Hames testified that written notice of default signed by the plaintiffs and Nihell had been served on the defendant mining company and its assignors between the dates of July 8 and 10, 1937, and that when plaintiffs' contract was executed he knew that the owner Nihell had theretofore executed a contract with the defendant's assignors but that "Nihell said the contract was in default".

The witness Nihell, called by the plaintiffs under section 2055 of the Code of Civil Procedure, testified that in October, 1934, he entered into a contract with the defendant's assignors for the sale of the land; that all of the stipulated payments were not made as therein specified but "a settlement was made" and at that time he "excused" further payments; that when he entered into the contract with plaintiffs in 1937, "an arrangement had been made" with the defendant settling all payments due under its contract; and that when so contracting with the plaintiffs he knew the defendant's contract "was still good and still valid". At this point, the trial court interrupted to state that "It looks like he sold it twice, to both parties; it is a funny proposition. This thing certainly would bear some investigation. I don't understand this." A little earlier in the trial the court below had directed the attention of counsel for the defendant herein to the fact that upon a prior occasion when said counsel had represented Nihell in other litigation, the court had "understood from Mr. Nihell that the other [defendant's] contract was not in force" which contract "you [counsel for defendant] now tell me is valid". The court thereupon observed that counsel's "position is rather inconsistent" in view of the fact that his former client, Nihell the owner, "at the other trial * * * took the position that the contract that the other party [defendant herein] had was void". The court expressed surprise at Nihell's "about face" in the matter and concluded by stating that: "Now he [Nihell] comes in and says that the other contract [defendant's contract] is in good standing. I have a notion to throw the whole thing out. I am disgusted with the whole thing."

Counsel for plaintiff thereupon undertook to examine Nihell with regard to the "Notice of Default" (plaintiffs' exhibit No. 4) to which his signature admittedly was appended and the witness stated that he "didn't understand" the instrument when he signed it. This caused the court below to declare: "How can you get any place with testimony of that kind? He doesn't remember, doesn't understand, doesn't know anything about it. It is useless to proceed with a witness of that stamp and that kind of recollection. He doesn't know anything about his contract or anything, although it is his property and he makes the contracts."

In his effort to impeach the witness Nihell, counsel for plaintiffs called to his attention his answers given upon the taking of a deposition in another action between plaintiffs and Nihell as owner wherein he stated that when he entered into the contract with plaintiffs he did so believing "the property was clear". When pressed for an explanation as to why he had entered into a contract of purchase with plaintiffs when his testimony here was to the effect that the prior contract under which defendant claims was still in good standing, he replied "I can't answer now, because I don't know", adding that "whatever I testified to in the examination [deposition] was what my mind was at that time". He also stated that he could not "remember" whether he kept the defendant's contract alive by granting an extension of time for performance. In attempted explanation of his express representation in plaintiffs' contract that the contract of defendant was then "in default" and that "written notice of such default" had been given, he declared that he had not read that part of plaintiffs' contract and that if he had he "didn't understand it". Thereupon he testified that he thought defendant's contract "was in effect" but he was unable to explain why he had accepted payments from both sides to this litigation under contracts that were necessarily antagonistic, one to the other.

[1-4] Sufficient has been said to indicate the unsatisfactory and in many respects contradictory nature of the evidence addressed to the issue having to do with the owner Nihell's waiver, or lack of waiver, of the default that admittedly occurred in the defendant's performance under its contract. The state of the record is such that we cannot say that the trial court erred or abused its discretion in granting the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence. The rules of law applicable to an appeal from such an order are well settled. A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence. Weringer v. Rutledge, 180 Cal. 566, 569, 182 P. 31. When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. Hanlon Drydock & Shipbuilding Co. v. Southern Pacific Co., 92 Cal.App. 230, 232, 268 P. 385. It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P. 1029; Roma Wine Co. v. Hardware Mutual Fire Ins. Co., Cal.App., 88 P.2d 260; Prout v. Perkins, 21 Cal.App.2d 343, 69 P.2d 194; Taylor v. Rodriquez, 10 Cal.App.2d 608, 52 P.2d 494; Peri v. Culley, 119 Cal.App. 117, 6 P.2d 86. In view of the witness Nihell's many inconsistent statements on the issue of waiver of the defendant's default under its contract, in view of his short and at times vacillating memory of many details in connection therewith and in view of his inability to satisfactorily explain his execution of a later contract of purchase with the plaintiffs and the collection of payments thereunder, we are satisfied that the trial court upon motion for new trial might well conclude, in the exercise of its discretion, that those portions of Nihell's testimony tending to indicate that he had excused and waived any default in the defendant's performance under its contract, were unworthy of credence. A new trial is warranted under such circumstances.

The order appealed from is affirmed.

---

14 Cal.2d 134

**In re MORRO.**

**MORRO et al. v. MORRO et al.**

**L. A. 17043.**

Supreme Court of California.

Aug. 3, 1939.

**1. Appeal and error 🔑478**

On application for a writ of supersedeas to stay an order to show cause why a commissioner should not be appointed to execute a deed conveying property of an incompetent to the guardian of his estate, pending appeal from two prior orders requiring the execution of the deed, the validity of the prior orders would not be considered by Supreme Court.

**2. Appeal and error 🔑478**

An application for a writ of supersedeas to stay an order to show cause why a commissioner should not be appointed to execute a deed conveying property of an incompetent to guardian of his estate, pending appeal from orders requiring execution of deed, would be denied for failure to comply with or to assign good reasons for noncompliance with the statute providing that an order directing execution of a conveyance will not be stayed pending appeal until instrument is executed and deposited with clerk. Code Civ.Proc. § 944.

**3. Appeal and error 🔑458(1)**

The writ of supersedeas will issue only where a stay is not provided by statute, or, if a statutory stay be provided, sufficient reason appears why the appellants have not perfected the stay in accordance therewith. Code Civ.Proc. § 944.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Proceedings in the matter of the estate and guardianship of Bartolomeo Morro, an incompetent person, by Martha Morro and Madeline Rowe against Dominic Morro, guardian of the person of Bartolomeo Morro, an incompetent person, and Albert John Morro, guardian of the estate of Bartolomeo Morro, an incompetent person, for a writ of supersedeas to stay enforcement of an order directing execution and delivery of certain deed pending appeal by Martha Morro and another from said order.

Writ denied.

Dan M. Critchley, of Los Angeles, for appellants.

Ralph W. Evans, of Los Angeles, for respondents.

SHENK, Justice.

This is a petition for a writ of supersedeas to stay the enforcement of an order directing execution and delivery by the appellants of a certain grant deed pending appeal from said order.

On September 30, 1937, Dominic Morro applied to the superior court in Los Angeles county for the appointment of himself as guardian of the person and estate of Bartolomeo Morro, an alleged incompetent. His petition showed that the alleged incompetent's estate consisted of two parcels of land in the county of Los Angeles and one parcel in Tulare county, title to which was held in the name of Martha Morro, a daughter of the incompetent, and that said Martha Morro also had in her possession the sum of $3,250 belonging to the incompetent; that there were pending in the superior court of Los Angeles county two actions, Nos. 420565 and 420568, brought by Bartolomeo Morro as plaintiff against Martha Morro, whereby he sought to recover title to the real property and a judgment for the moneys hereinabove mentioned.

Martha Morro and another daughter, Madeline Rowe, contested the appointment sought by Dominic Morro. The matter was heard before the court sitting in probate.

On October 25, 1937, a minute order was entered declaring Bartolomeo Morro incompetent and the owner of the real and personal property referred to, and appointing Mrs. Madeline Rowe and Albert Morro guardians of the estate of the incompetent, and Dominic Morro guardian of his person. Pursuant to stipulation the court also ordered guardians Madeline Rowe and Albert Morro to accept on behalf of the incompetent an offer to transfer $2,400 cash and deeds to the three parcels of real property to be executed by Martha Morro and Madeline Rowe.

On December 23, 1937, an order appointing the persons named as guardians was entered. That order incorporated the foregoing provisions of the minute order and directed conveyance of the real property and delivery of the sum of $2,400 by Martha Morro and Madeline Rowe.

Subsequently, Martha Morro moved to set aside the order of December 23, 1937; but the motion was denied on the ground that the order was a consent decree.

On June 2, 1938, the court granted the application of Dominic Morro and Albert Morro as guardians for an order compelling compliance with the order of December 23, 1937. Finally, upon application of the guardians, the court on September 29, 1938, made its order directing the manner of compliance with its order of December 23, 1937, namely, that said Martha Morro and Madeline Rowe execute a grant deed of the property involved running to "Bartolomeo Morro, an incompetent", as sole grantee, and that they deliver the same to Albert Morro as guardian of the incompetent's estate. Martha Morro and Madeline Rowe have appealed from the order of September 29, 1938, on the ground that the court had no power to compel compliance with its order of December 23, 1937, which, it is contended, was beyond its jurisdiction and void.

Subsequently and in December, 1938, upon the application of Albert Morro, the superior court issued its order directing Martha Morro and Madeline Rowe to show cause why a commissioner should not be appointed to execute the grant deed conveying said real property to the incompetent and deliver the same to Albert Morro as such guardian. It is the foregoing order which the appellants are seeking to have stayed pending their appeal from the order of September 29, 1938.

The appellants have not complied with section 944 of the Code of Civil Procedure which provides: "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court."

[1] The question of the validity of the order of September 29, 1938, or of the order of December 23, 1937, is not of concern on this application. That question will be considered with the merits of the appeal.

[2, 3] The appellants have presented no good reason why they have not complied with the requirements of said section 944. The writ of supersedeas will issue only where a stay is not provided by statute, or, if a statutory stay be provided, sufficient reason appears why the appellants have not perfected the stay in accordance therewith. Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2; Foster v. Fernandes, 200 Cal. 274, 252 P. 726; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161; Julian v. Schwartz, 2 Cal.2d 280, 40 P.2d 818. In this case the appellants' failure to comply with the applicable statutory requirement is not shown to be excusable. In such a case the writ will be denied. Willis v. Paul, 116 Cal.App. 733, 3 P.2d 339.

The writ is denied and the order to show cause heretofore issued is discharged.

We concur: EDMONDS, J.; CURTIS, J.; HOUSER, J.

---

14 Cal.2d 128

## LANAHAN et al. v. CITY OF LOS ANGELES et al.

L. A. 17024.

Supreme Court of California.

Aug. 3, 1939.

Rehearing Denied Aug. 31, 1939.

**1. Action 🔑6**

Parties attacking validity of a proceeding to recall a city mayor on grounds of illegality in securing signatures on recall petition were not entitled to declaratory relief. Code Civ.Proc. § 1060.

**2. Municipal corporations 🔑159(6)**

The provision in the charter of the city of Los Angeles that after an election based on any initiative petition the sufficiency of such petition shall not be subject to judicial review is equally applicable to recall petitions. St.1925, pp. 1109, 1117 et seq., §§ 273, 290–299.

**3. Appeal and error 🔑781(4)**

Where, pending an appeal from an order granting a motion to strike the complaint and quash the service of summons in an action to enjoin city officials from calling or conducting a recall election, the election was held, the case was moot and would be dismissed on appeal. St.1925, p. 1117 et seq., §§ 290–299.

**4. Appeal and error 🔑843(1)**

A reviewing court will not answer abstract questions not directly affecting rights of parties.

**5. Appeal and error 🔑803**

A dismissal of an appeal from an order striking the complaint in an action to enjoin city officials from holding a recall election on ground that case was moot does not constitute approval by reviewing court of alleged violations of law in bringing about recall election. St.1925, p. 1117 et seq., §§ 290–299.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis C. Drapeau, Judge.

Proceeding by Frances E. Lanahan and others to enjoin the City of Los Angeles (a municipal corporation) and others from calling or conducting a recall election. On motion to dismiss plaintiffs' appeal from an order granting defendants' motion to strike the bill of complaint and quash service of summons.

Dismissed.

Becker & Becker, Emanuel Becker, and Abraham Becker, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Leon T. David, Asst. City Atty., both of Los Angeles, for respondents.

SHENK, Justice.

This is a motion to dismiss an appeal on the ground that the same has become moot

On the 14th day of July, 1938, there was filed in the office of the city clerk of the City of Los Angeles a recall petition containing approximately 120,000 signatures and demanding the submission to the electors of the City of Los Angeles of the question whether Frank L. Shaw, the mayor of said city, should be removed from his office and, if recalled, his successor be elected. Pursuant to the duties imposed upon him by the city charter, the city clerk examined the recall petition and ascertained and declared that it contained more than the requisite number of signatures of qualified electors of the city to require that the question be submitted to a vote of the people of the city. Under date of July 26, 1938, he filed a certificate to that effect with the city council. On August 23, 1938, the city council passed an ordinance calling a special election for September 16, 1938. The election was held on that day, resulting in a vote of 236,525 for, and 129,245 against, the recall. The vote for the successor was 233,427 in favor of Fletcher Bowron, and 122,692 for Frank L. Shaw. Upon a canvass of the returns the city council, at its meeting of September 23, 1938, declared Frank L. Shaw recalled and Fletcher Bowron elected as mayor.

On August 23, 1938, the plaintiffs brought this action to enjoin the defendant city officials from calling or conducting the recall election. On August 31, the city attorney, on behalf of the defendants, moved the trial court to strike the complaint from the files and quash the service of summons on the ground that the court had no jurisdiction of the subject-matter of the action. The motion was granted. On September 6, 1938, the plaintiffs herein applied to this court for the writ of mandamus to compel the superior court to assume jurisdiction of, or proceed with, the injunction suit. The application was denied on September 8, for the obvious reason that the election would be held long before final action could be taken in the mandamus proceeding. Lenahan et al. v. Superior Court, S. F. No. 16119.[1] The plaintiffs appeal from the order granting the motion to strike and to quash, and, by bill of exceptions settled and filed on November 23, 1938, assign error on the part of the trial court in granting the motion.

[1] The plaintiffs sought to enjoin the election on the grounds: 1. That some of the sections of the recall petition did not have attached thereto the affidavit of the circulator that the signatures thereon were obtained in his presence; that the sheets of some sections were not fastened together at the time the signatures were appended thereto; that the clerk certified signatures of signers who were not qualified electors of the city; that signatures were obtained by persons other than the ones making the required affidavits; that persons were induced to sign by reason of alleged false statements of those obtaining such signatures, and that many of the signatures were forgeries. 2. That signatures on said recall petition were obtained pursuant to contracts made with persons who contracted to secure signatures for compensation, and that this method of obtaining signatures is against public policy and rendered the petition invalid. 3. That the clerk was guilty of a dereliction of duty in that he employed incompetent and unreliable help in checking the recall petition; that the clerk was guilty of arbitrary rulings in passing upon questioned signatures; that dates of signatures were not affixed at the time of signing, and that signatures were obtained more than six months prior to the date of filing the recall petition. All of the foregoing was alleged to have been contrary to the requirements of the law governing the action of the city authorities in the premises. By a fourth count an attempt was made to set forth a cause of action for declaratory relief. But the declaratory relief provided for in section 1060 of the Code of Civil Procedure does not apply to a situation such as here presented. Dietz v. Zimmer, 231 Ky. 546, 21 S.W.2d 999.

The trial court entered an order in its minutes granting the motion of the defendants to strike the complaint, to quash the service of summons and to quash an order to take depositions. No judgment for costs or otherwise was entered.

The defendants suggest that the order granting their motion is not an appealable order, but they do not urge the point. For present purposes only it will be deemed a sufficient final disposition of the cause to justify the appeal sought to be dismissed.

It appears beyond question that every act sought to be enjoined has actually taken place. The election has been held and it is not even intimated that any of the alleged deficiencies or irregularities in the presentation and certification of the recall petition prevented a full and fair vote at the recall election. The result of the election was duly canvassed and declared. The elected mayor assumed his office and has since been functioning as such. A reversal of the order would vest the trial court with no justiciable controversy in this action for the reason that what was sought to be enjoined has already been done. The nature of the action was such that when the injunctive relief therein sought was rendered inappropriate and ineffective, any further consideration of the cause as an action in injunction would be unavailing. In other words, when the event which it was sought to enjoin, that is, the election, had taken place, the remedies of the plaintiffs were removed from the field of injunctive relief and were relegated to such remedies, if any, as they might have and avail themselves of subsequent to the election. Certainly they may not, after the election has been held, still urge a court to stop it.

---

[1] No opinion filed.

The foregoing conclusions are in harmony with the provisions of the Los Angeles city charter, and are supported by authorities in this state and elsewhere.

The recall of elective officers of the City of Los Angeles is provided for in sections 290 to 299 of the city charter. (Stats.1925, p. 1117 et seq.) Subdivision (b) of section 290 provides: "The provisions of this article [article XXVII] relating to the form and to the mode of signing initiative petitions, and to the filing, examination, certification and amendment thereof, and to the presentation of the same to the Council, shall apply to any petition filed with the City Clerk under this section, which petition shall be designated as a recall petition. The sufficiency or insufficiency of any recall petition shall not be subject to review by the Council." Section 273 of the same article provides for the form and the mode of signing initiative petitions, and to the filing, examination, certification and amendment thereof and to the presentation of the same to the council. That section also provides that the sufficiency or insufficiency of such initiative petitions shall not be subject to review by the council. It also contains the following provision: "After an election based on any initiative petition, the sufficiency of such petition in any respect shall not be subject to judicial review or be otherwise questioned."

[2] There would seem to be every reason for the incorporation by reference of the sentence last quoted into the recall provisions of the charter. Whether this is done from the standpoint of strict construction may be questioned. However, the law generally supplies the reason and the authority for applying the same rule to a recall election as is applicable to an election under the initiative provisions of the charter.

In this state the case of Bradley v. Voorsanger, 143 Cal. 214, 76 P. 1031, would seem to be directly in point. There, as here, a taxpayer sued to enjoin the holding of an election. The defendants had judgment and the plaintiff appealed. Pending the appeal the election was held. A motion to dismiss the appeal on the ground that there was then no substantial controversy between the parties and that the appeal presented merely a moot question was granted. It was held that no judgment which could be rendered upon the appeal would afford the plaintiff any relief. See, also, Campbell v. Superior Court, 126 Cal.App. 652, 14 P.2d 925. In Johnson v. Dosland, 103 Minn. 147, 114 N.W. 465, an appeal was taken from a judgment in favor of the contestee candidate. The election was held and the contestee was declared elected. The court on its own motion dismissed the appeal on the ground that a reversal of the judgment would avail the appellant nothing, and that, since the election had been held, the questions presented by the appeal had become moot. See, also, State ex rel. and to Use of, Conran v. Duncan, 333 Mo. 673, 63 S.W.2d 135; People ex rel. v. Emmerson, 333 Ill. 606, 165 N.E. 217, 62 A.L.R. 912.

[3-5] The plaintiffs contend that the question is not moot because a consideration of the merits of the appeal would be of value to the litigants and particularly because it would tend to insure adherence to legal procedure hereafter. It is also insisted that a dismissal would be equivalent to an affirmance of the judgment. A sufficient answer would seem to be that the time of the court should not be engaged in resolving abstract questions not directly affecting the rights of the parties, and, secondly, that there is no judgment on the merits on which a dismissal of the appeal would operate as an affirmance. The merits of the plaintiffs' alleged causes of action were not passed upon by the trial court, nor are the merits thereof de-

termined here. A dismissal of the appeal in no way places the stamp of approval on the alleged infractions of asserted requirements of the law in bringing about the election. All that is now decided is that the controversy which the plaintiffs attempted to raise by the filing of their complaint for an injunction has, by reason of the subsequent election, faded into insubstantiality.

The motion is granted and the appeal is dismissed.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.; NOURSE, Justice pro tem.

---

14 Cal.2d 137

## PEOPLE v. SPINELLI.

Cr. 4224.

Supreme Court of California.

Aug. 3, 1939.

**1. Homicide 🔑253(1)**

In murder trial, evidence *held* sufficient to justify jury's determination that killing was premeditated, willful, and intentional, and not committed in self-defense, so as to warrant conviction of first-degree murder, not merely voluntary manslaughter.

**2. Criminal law 🔑763(8)**

In murder trial, instruction that, where circumstances justify defendant in striking assailant in self-defense, assailant has fallen to floor, and danger of great bodily injury to defendant has been removed, defendant is guilty of felonious homicide, if he thereafter strikes fatal blow on assailant's body, was not erroneous as invading jury's province to determine fact question.

**3. Criminal law 🔑722(3)**

In trial for murder of defendant's wife, testimony and district attorney's remarks concerning defendant's incestuous relations with his daughter were not improper as produced or made for sole purpose of creating prejudice in jurors' minds, where defendant's statement or confession disclosed many quarrels between him and decedent because of decedent's knowledge of such incestuous relationship.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Virgilio Spinelli was convicted of first-degree murder, and he appeals.

Affirmed.

A. P. Coviello, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

YORK, Justice pro tem.

The appellant, Virgilio Spinelli, also known as William Spinelli, was charged in an information filed by the district attorney of Los Angeles county with the crime of murder, the charge being that on or about December 12, 1938, he did "wilfully, unlawfully and feloniously and with malice aforethought murder one Rose Spinelli, a human being."

Appellant entered a plea of "not guilty" to the charge, as well as a plea of "not guilty by reason of insanity". He was thereafter tried by a jury which returned its verdict finding appellant guilty of murder, as charged in the information, and finding the offense to be murder in the first degree without any recommendation for mercy. Trial was then had upon the issue of insanity, the jury duly returning its verdict finding appellant sane at the time of the commission of the offense charged in the information. Motion for new trial was made and denied, and judgment was thereafter pronounced and appellant sentenced to the state's prison to be there put to death in the lethal gas chamber.

This cause comes to this court upon an automatic appeal from such judgment, as well as from the order by which appellant's motion for a new trial was denied. The briefs filed herein are appellant's opening brief and respondent's reply thereto, no closing brief having been filed on behalf of appellant, but the matter was argued before the court.

Appellant raises three points upon this appeal, namely: (1) Alleged insufficiency of the evidence to support the judgment; (2) Alleged error in instructing the jury; (3) Alleged error by the court in the admission and rejection of evidence.

Appellant raises no question as to the propriety of the jury's finding as to his sanity upon his plea of "not guilty by reason of insanity".

The evidence adduced at the trial, omitting some of the more sordid details the recital of which would serve no useful purpose upon this appeal, shows the following facts: On December 12, 1938, and for about twenty years prior thereto, appellant and his wife owned and lived upon the property known as 305 North Mountain View avenue in the city of Los Angeles, and during several years prior to that date had been having serious domestic difficulties, appellant and his wife occupying rooms in different ends of the house upon the said property. On the said date, and for about three weeks immediately prior thereto, appellant and his wife together with their son, William Spinelli, Jr., were the sole occupants of this house. There were five children the issue of this marriage, three girls and two boys, and it is admitted that one of the causes of the trouble between appellant and his wife was the incestuous relations between appellant and at least one of his daughters.

The deceased met her death on the morning of December 12, 1938, and on or about the 21st day of the same month, appellant was arrested and charged with her murder.

Appellant in his opening brief makes the point that he "gave a confession or statement to the police in which he admitted striking the deceased two blows in the head with a hatchet, as a result of which she died. He further stated that while he was lying on his bed in his front bedroom the deceased came into the room and struck at his head with the hatchet, inflicting a three-inch wound on his forehead. He partially parried the blow with his hand and at the same time kicked out and struck her in the chest or stomach, causing her to fall over backward in a sitting position. That he then snatched the hatchet from her and struck her in the head twice." It is the contention of appellant that this statement which he made to the police officers soon after his arrest on December 21, 1938, discloses a justifiable homicide.

Said statement, as it appears in the record, is in part as follows:

"I laid down on the bed and she hit me over here (indicating head). I threw up my hands and I grabbed for the hatchet and I kicked her in the stomach and she fell down and I got up and hit her two times in the head.

"Q. With what? A. With the hatchet. I hit her two times in the head while she was laying down. I hit her two times and she was on her face like that and I went back to the bed and I was plenty blood, no use to lie."

He then stated that he left the house and had the wound in his forehead dressed by a doctor, secured some food for himself and returned home where he dismembered the body and reduced it to ashes by piling portions of it with wood in a ditch which had been dug in the back yard and used as an incinerator. Such remains were thereafter strewn by appellant in deep ruts in the driveway leading into the said property, where certain dental bridgework, a wedding ring and some fragments of bone were later found. There was therefore no way of finding out by an examination of the body of deceased what actually caused her death.

For a long period of time appellant had done nothing toward the support of himself, his said wife or his family, and so far as the record reveals, he was entirely supported by his wife, who was employed doing housework for one of the neighbors, together with some assistance from his children.

The only point made by appellant that is worthy of consideration is that the facts in evidence bring this case within a certain quoted portion of the opinion written by Mr. Chief Justice Waste in People v. Howard, 211 Cal. 322, at page 329, 295 P. 333, 71 A.L.R. 1385, it being the contention of appellant that the only evidence before the jury was that the decedent was the aggressor in a quarrel which led up to the homicide, and that there remains no evidence from which it might reasonably be deduced that the killing was the result of a wilful, deliberate and premeditated intent to kill, appellant contending, as in the cited case that there is a dearth of evidence tending to show conditions as they existed at the time of the homicide and from which it might reasonably be held that the murder was, in fact, wilful, premeditated and intentional.

[1] Although it is true that appellant was the only witness to the crime, nevertheless, under all the facts and circumstances disclosed by the record, the cir-

cumstantial, if not the direct, evidence is sufficient to justify the jury in determining that the murder was premeditated, wilful and intentional. It is quite improbable that appellant would have used the terrible means he did in disposing of his wife's body, unless he had actually intended to murder her, and unless the act was wilful and premeditated; in fact, she may not have been actually killed until appellant cut off her head. Appellant destroyed all physical evidence as to the exact manner in which he accomplished the death of his wife, but both his acts and his statements which were made after he killed her were sufficient to justify the jury in finding that the crime was murder in the first degree. His attempt to besmirch her character by stating that she had gone off with another man, and his act in getting his son to write a letter to that effect, which appellant thereafter sought to pass off as his wife's handwriting, together with the brutal dismembering and destruction of his wife's body, are all wholly inconsistent with his contention that he acted only in self-defense. The jury was completely justified in believing that he murdered his wife maliciously and that his malice against her continued long after her death.

It is also appellant's theory that he could be found guilty of no greater crime than that of voluntary manslaughter, because all of the evidence tends to prove the decedent was the aggressor in the fatal affray. The evidence of the relations which existed between the husband and wife constitutes a sufficient basis for the jury's determination that the murder was in fact wilful, premeditated and intentional. The testimony of appellant alone completely repudiates the theory or belief that the killing was committed by him in self-defense. He admits that he killed his wife while she was lying upon the floor in an unconscious condition by hitting her on the back of the head in at least two places. The fact that he was a small man and she was a large woman would be inadequate as a justification for the deliberate killing as testified to by appellant himself.

A similar situation was before this court in People v. Johnson, 203 Cal. 153, at page 164, 263 P. 524, at page 529, where it is stated: "As to the argument that no malice on the part of the defendant, which is a necessary element or ingredient of murder of the first degree, was shown by the case presented and, therefore, the penalty fixed by the jury cannot stand, it is sufficient to say that the duty of affixing the penalty in murder cases of the first degree is, by section 190, Penal Code, committed to the sound discretion of the jury trying the case. Malice, as defined by section 188, Penal Code, may be express or implied. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Again these are questions which it is the province of the jury to determine. The ruthless disposition of the body of the deceased, following the killing, certainly is some evidence as to an abandoned or malignant heart upon the part of the slayer. However this may be, section 1105, Penal Code, provides that: 'The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable'. The defendant offered no proof to meet the burden which the law casts upon him, and, as there was no claim of justification or excuse offered for the killing of decedent or pretense that the proof tended to show that the crime committed only amounted to manslaughter, the crime was murder of the first degree."

[2] Appellant contends that the trial court "committed prejudicial error in instructing the jury that if an assailant has fallen to the floor and the danger of great bodily injury to the defendant has been removed, if the defendant thereafter strike a fatal blow upon his assailant such blow is not justified"; urging that this was an instruction as to a matter of fact and as such was an invasion of the province of the jury. An analysis of the instruction complained of discloses that it contains a qualifying clause, and that it is only "where the circumstances are such as to justify a defendant in striking his assailant in self-defense and such assailant has fallen to the floor and the danger of great bodily injury to the defendant has been removed", that the defendant is guilty of felonious homicide if he thereafter strikes a fatal blow upon the body of his adversary. It is perfectly obvious that there is nothing

objectionable in the wording of this instruction. The rights of appellant were fully protected by the trial court, and the particular instruction hereinbefore referred to, together with the other instructions which were given upon the subject of self-defense, correctly stated the law of the case.

[3] Appellant finally urges that the verdict was the result of passion and prejudice, contending that "the incestuous relations could not possibly have been the motive for the killing, and that the only purpose which any and all remarks or testimony produced on the part of the district attorney in connection with the said alleged incest was for the purpose of creating prejudice and bias in the minds of the jury".

There is no merit in this contention. It was a necessary fact to show the real reason for the commission of the murder. The statement or confession of appellant himself discloses that many of the quarrels between appellant and decedent resulted from the fact that decedent knew that appellant was having an incestuous relationship with one of the daughters.

All of the facts and circumstances disclosed by the record in this case show a vicious, wanton and wilful murder of decedent by appellant. The jury was not only justified in bringing in its verdict of murder in the first degree without recommendation as to clemency, but it could hardly have brought in any other verdict.

Both the judgment and the order appealed from are affirmed.

We concur: SHENK, J.; EDMONDS, J.; CURTIS, J.; HOUSER, J.

---

34 Cal.App.2d 48

**In re ANDERSON.**

**Cr. 2082.**

**District Court of Appeal, First District, Division 1, California.**

**Aug. 1, 1939.**

**Hearing Denied Aug. 31, 1939.**

**1. Pardon 🔑6**

Under constitutional provision giving Governor power to grant pardons after "conviction," Governor was authorized to grant unconditional pardon after verdict of guilty but before sentence and judgment in criminal conspiracy prosecution since sentence by the court is not essential to completion of a "conviction." Pen.Code, § 182; Const. art. 7.

> The ordinary legal meaning of the word "conviction" when used to designate a particular stage of a criminal prosecution triable by a jury is the confession of the accused in open court or a verdict returned against him by a jury, which ascertains and publishes the fact of his guilt, while "judgment" or "sentence" is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained.
>
> [Ed. Note.—For other definitions of "Convicted; Conviction" "Judgment (In Law)" and "Sentence" see Words & Phrases.]

**2. Statutes 🔑188, 192**

In interpreting words found in a statute or Constitution, such words as have both a popular and a technical meaning should be accorded their popular meaning, unless the nature of the subject indicates or the context suggests that they are used in a technical sense.

**3. Pardon 🔑6**

Under constitutional provision granting Governor power to grant pardons after "conviction" and providing that the Governor shall communicate to the Legislature at the beginning of every session, every case of pardon granted, stating name of convict, "the crime for which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same," term "conviction" does not include judgment or sentence as against contention that if the Governor is required to report the sentence in the case of every pardon granted, that the term "conviction" must include sentence. Const. art. 7.

◆

Proceeding in the matter of the petition of Frank B. Anderson for a writ of habeas corpus.

Writ granted and petitioner discharged.

Len H. Honey, of Stockton, for petitioner.

A. E. Bagshaw, Dist. Atty., of San Rafael, County of Marin, for respondent.

PETERS, Presiding Justice.

In December of 1938 petitioner, Frank B. Anderson, was found guilty by a jury of the felony of criminal conspiracy as defined in section 182 of the Penal Code. The date for sentence was set for January 4, 1939. On January 1, 1939, the then governor, Frank F. Merriam, upon application of petitioner, issued to petitioner an unconditional pardon. The trial court held the pardon invalid, and on January 4, 1939, proceeded to sentence petitioner, and to place him on probation on certain terms and conditions. The petitioner refused to accept the conditions imposed, whereupon probation was revoked. Petitioner now seeks his discharge on habeas corpus, contending the pardon is valid and that his further detention is unlawful.

Article VII of the Constitution is the section which defines and limits the power of the governor to grant pardons. The first and third sentences of the section read as follows:

"The governor shall have the power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. * * * The governor shall communicate to the legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same. * * *"

In the instant case, the problem presented is whether an unconditional pardon granted after a verdict of guilty, but before sentence and judgment, is a pardon granted "after conviction" within the meaning of the above-quoted provision. This precise question has never been passed upon by the appellate courts of this state. It has, however, received consideration by the courts of other states. Most state constitutions, in an attempt to prohibit the abuses existent at common law under which the crown exercised the power of pardon at any time, contain a provision similar to the one above quoted limiting the pardoning power to situations where there has been a "conviction". In interpreting these provisions the majority of the states have held that the word "conviction" so used must be given its ordinary legal meaning, namely, that the term refers to the verdict of guilty or confession of the defendant in open court and does not refer to the sentence or judgment. The applicable rule is stated as follows in 20 Ruling Case Law, 539, section 21:

"The ordinary legal meaning of 'conviction', when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or a verdict returned against him by a jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. A conviction then within the meaning of these constitutional provisions is a stage of the proceedings which precedes the judgment or sentence of the court, which later serves merely as the basis of an appeal or execution, and not to enlarge the verdict or aid in the determination of the guilt of the accused. That being so, sentence by the court is not essential to the completion of a 'conviction', and is not a necessary precedent to the exercise of the pardoning power."

This rule of construction finds support in many cases. See Commonwealth v. Lockwood, 109 Mass. 323, 12 Am.Rep. 699; State ex rel. Butler v. Moise, 48 La.Ann. 109, 18 So. 943, 35 L.R.A. 701; People v. Marsh, 125 Mich. 410, 84 N.W. 472, 51 L.R.A. 461, 84 Am.St.Rep. 584; Spafford v. Benzie, 136 Mich. 25, 98 N.W. 741; State ex rel. Barnes v. Garrett, 135 Tenn. 617, 188 S.W. 58, L.R.A.1917B, 567; Battistelli v. State, 141 Tenn. 565, 213 S.W. 417; Duke v. State, 106 Tex.Cr.R. 154, 291 S.W. 539; Goss v. State, 107 Tex.Cr.R. 659, 298 S.W. 585; see, also, State v. Alexander, 76 N.C. 231, 22 Am.Rep. 675. A minority of the states hold that the term "conviction" in such constitutional provisions should not be given its popular meaning, but should be interpreted in a strict technical legal sense. So interpreted these courts have held that the term denotes the final judgment of the court and that a verdict of guilty without the imposition of sentence is not, therefore, a conviction. Ex parte Campion, 79 Neb. 364, 112 N.W. 585, 11 L.R.A.,N.S., 865, 126 Am.St.Rep. 667, 16 Ann.Cas. 319; Ex parte White, 28 Okl.Cr. 180, 230 P. 522; Gilmore v. State, 3 Okl.Cr. 639, 108 P. 416, 139 Am.St.Rep. 981.

[1, 2] The reasoning of the cases stating the majority rule seems to us to be sound. There would seem to be no reason why the word "conviction" in article VII, supra, should not be accorded its normal popular meaning. The rule is well settled, of course, that in interpreting words found in a statute or constitution, such words as have both a popular and a technical meaning should be accorded their popular meaning, unless the nature of the subject indicates, or the context suggests, that they are used in a technical sense. 23 Cal.Jur. 749, § 124.

Although, as already stated, the courts of this state have never passed on the meaning of the term "conviction" as used in article VII, supra, they have, in several cases, interpreted the term as used in several statutes. In all but one case, hereafter mentioned, it has been held that the term "conviction" should be interpreted as meaning the verdict of guilty, and that sentence and judgment are not necessary to constitute a conviction. In Ex parte Brown, 68 Cal. 176, 8 P. 829, the precise question involved was whether or not a person after verdict but before sentence and judgment could be admitted to bail under a statute, Pen.Code, § 1272, permitting admission to bail pending appeal "after conviction of an offense not punishable with death". After reviewing many of the authorities the court held that (68 Cal. at page 180, 8 P. at page 831):

"The foregoing references show that the ordinary meaning of the word 'conviction' is the verdict of guilty pronounced by a jury. As said by Reade, J., speaking for the court in State v. Alexander, supra: 'The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him, nor that the judge convicted him.' 76 N.C. [at page] 232 [22 Am.Rep. 675].

"Now, while the word may be used as signifying the sentence pronounced on the verdict, or the record of conviction, including inter alia the verdict and sentence, still such meaning ought not to be attributed to it, unless there is something in the context to indicate that it was used in such sense. * * *"

In People v. Ward, 134 Cal. 301, 66 P. 372, the defendant on appeal contended that a judgment against him should be reversed for the reason that on the trial one of his witnesses on cross-examination had been asked whether he had been convicted of a felony. It was shown that he had been found guilty of a felony by a verdict of a jury but had not been sentenced. Section 2051 of the Code of Civil Procedure permits the impeachment of a witness by a showing that he has been "convicted of a felony". It was contended that this witness, not having been sentenced, had not been "convicted", and that, therefore, he could not be so impeached. The Supreme Court held that within the meaning of the section the witness had been convicted and that sentence is not necessary to a conviction. On this point the court stated (134 Cal. at page 307, 66 P. at page 374):

"It is contended that, at the time the witness testified, he had not been 'convicted of a felony'; that to sustain the ruling of the court it must be assumed, as a matter of law, that the verdict of guilty constituted a 'conviction.' That such verdict does constitute a conviction, within the ordinary as well as the technical meaning of the word, seems to be well settled. Blackstone (book 4, p. 362), after speaking of the verdict of acquittal, says: 'But if the jury find him guilty, he is then to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways,—either by his confessing the offense and pleading guilty, or being found so by the verdict of his country.'"

Both of the above cases, in reaching the conclusion that "conviction" meant the verdict of guilty emphasized that throughout the Penal Code the terms "convict" and "conviction" are used to indicate the verdict of the jury and not the sentence of the court. That this is so, see sections 671, 689, 1151, 1157, 1161, 1207, 1217, 1218 and 1445 of the Penal Code.

In McKannay v. Horton, 151 Cal. 711, 91 P. 598, 13 L.R.A.,N.S., 661, 121 Am.St. Rep. 146, the specific question presented was whether after verdict and judgment, but while an appeal was pending a person was "convicted of a felony" within the meaning of a charter provision. The majority of the court held he was so convicted. Justice Angellotti, in a concurring opinion, held that the person involved was in fact convicted upon the rendition of the verdict. In so holding he stated (151 Cal. at page 722, 91

P. at page 602, 13 L.R.A.,N.S., 661, 121 Am. St.Rep. 146):

"While I have concurred in the foregoing, I deem it proper to add that I am satisfied that the effect of the charter provision declaring that an office 'becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony,' etc., was to create a vacancy in the office of mayor upon the rendition and entry of the verdict of conviction against the then incumbent. One is 'convicted' of a crime when a verdict of guilty has been so given and entered against him or when a plea of guilty has been given and entered. This is the well-settled meaning of the term as ordinarily used in our constitutional and statutory provisions, and I can see no warrant for concluding that it was used in any other sense in the charter provision under discussion. Under this view, it is entirely immaterial whether or not judgment has been given upon the conviction, or whether or not the execution of any judgment so given has been stayed by an appeal. The vacancy in the office is in no way dependent upon any judgment given on the conviction, but was fully and finally created by the happening of the event specified, viz., the rendition and entry of the verdict of conviction."

There is nothing contrary to the reasoning of these cases in Re Riccardi, 182 Cal. 675, 189 P. 694. That case, while recognizing that the ordinary meaning of the term "conviction" does not include judgment or sentence, held, because of the peculiar consequences that would follow from a contrary construction under the facts of that case, that the term must be given a technical meaning. We see no reason for according the term as used in article VII, supra, any other than its usual, ordinary and general meaning.

[3] Respondent, while recognizing the term "conviction" as used in most statutory and constitutional provisions means verdict or plea of guilty and does not include judgment or sentence, contends that the term as used in article VII must be given a different meaning for the reason that the context of the section compels a different interpretation. He bases this contention on the third sentence of the constitutional provision which reads as follows: "The governor shall communicate to the legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same." It is contended that if the governor is required to report the sentence in the case of every pardon granted, that the term "conviction" in the first sentence of the section must be interpreted as including sentence. It is true that in Nebraska and Oklahoma the supreme courts of those states in the Campion and White cases, supra, in interpreting a similar constitutional provision and in reaching the conclusion that the pardoning power was limited to cases where judgment had been entered, placed some emphasis on the above-quoted sentence. We do not think, however, that the above-quoted portion of the section compels the construction contended for by respondent. Obviously the purpose of the third sentence was to compel the governor to disclose every pardon and commutation granted. In furtherance of this object it was provided that certain pertinent information, including the sentence imposed, should be disclosed. If no sentence has been imposed, obviously none can be reported. The third sentence of article VII in no way qualifies or explains the first sentence. The first sentence confers the pardoning power as there limited on the governor. Compliance or noncompliance with the requirements of the third sentence in no way affects the validity of a pardon granted under the first sentence.

For the foregoing reasons we conclude that under the provisions of article VII of the Constitution the governor may, and in this case properly did, pardon after verdict of guilty and before sentence and judgment.

The writ is granted and the petitioner discharged.

We concur: KNIGHT, J.; WARD, J.

## MORRISON v. MUTUAL LIFE INS. CO. OF NEW YORK.*

Civ. 11018.

District Court of Appeal, First District, Division 2, California.

Aug. 2, 1939.

Rehearing Denied Sept. 1, 1939.

Hearing Granted Sept. 29, 1939.

**1. Insurance** 🔑665(1)

In wife's action as beneficiary on husband's life insurance policy surrendered by him for cash value thereof, evidence *held* sufficient to support trial court's finding that policy was not given to plaintiff by husband.

**2. Insurance** 🔑654½

In action against insurer on life insurance policy by insured's wife as beneficiary after insured surrendered policy for cash value thereof, facts that plaintiff had possession of policy for 14 years and paid all premiums thereon were immaterial.

**3. Evidence** 🔑441(13), 445(1)

Parol conversations, in which insured's wife told insurer's soliciting agent that insured had given her life insurance policy and that she was taking out insurance on husband's life, were superseded by policy, which showed on its face that it was written on husband's application, so that it was his contract and could be modified or altered only by written contract, signed by executive officer or secretary of insurer, as provided therein. Civ.Code, §§ 1625, 1698.

**4. Insurance** 🔑239

Insured had right to exercise cash surrender option in life insurance policy without beneficiary's consent, in absence of provisions binding insured to obtain such consent to his acceptance of any of options in policy.

**5. Courts** 🔑95(1)

A decision of highest court of another state by divided court is not controlling in decision of same question by California District Court of Appeals.

**6. Insurance** 🔑205

A life insurance policy, reserving to insured right to change beneficiary or assign policy without beneficiary's consent, may be assigned by insured without such consent.

**7. Insurance** 🔑239

Insured could accept cash surrender option in life insurance policy, naming his wife as beneficiary, without first causing change of beneficiary or obtaining wife's consent, even if construction of policy was governed by New York law. Civil Code, § 1646; Domestic Relations Law N.Y. § 22.

**8. Insurance** 🔑235

In wife's action on husband's life insurance policy, naming her as beneficiary, after husband surrendered policy without wife's consent, as he had right to do, and received its cash value, paid by check to both spouses, it was immaterial whether wife's signature on back of check was forged by husband or some one else, as she was not injured by such forgery.

**9. Insurance** 🔑235

In wife's action on husband's life insurance policy, naming her as beneficiary, after he surrendered and received cash value of policy without her consent, as he had right to do, evidence that persons behind desk in defendant's office when spouses went there and discussed terms of policy as to payment of cash surrender value told plaintiff that such value was not payable except on application signed by her was properly excluded, where such persons were not identified or their authority defined.

**10. Appeal and error** 🔑931(4)

Where record on appeal from judgment for defendant pursuant to trial court's finding that action was barred by statutes of limitations does not show when action was commenced, appellate court must assume in support of judgment that trial court correctly found such facts. Code Civ.Proc. §§ 339, subd. 1, 343.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Julia F. Morrison against the Mutual Life Insurance Company of New York on a life insurance policy. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. Don Duncan, of San Francisco, for appellant.

Knight, Boland & Riordan, F. Eldred Boland, and R. M. Sims, Jr., all of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment denying her any relief in an action brought to recover under the provisions of a life insurance policy the plaintiff has appealed. The trial court made copious findings on all of the facts. She does not attack those findings but complains of the rulings of the court in applying the law to the facts found by it. Except as otherwise specifically mentioned, the facts recited herein are taken from the findings.

---

*For subsequent opinion see 103 P.2d 963.

The policy in controversy, on the face thereof, provided: "The Mutual Life Insurance Company of New York in consideration of the application for this policy, which is hereby made a part of this contract, promises to pay at its head office in the City of New York, unto Julia F. Morrison wife of John W. Morrison of Leadville in the County of Lake State of Colorado if living; if not to his executors, administrators or assigns, two thousand dollars, upon acceptance of satisfactory proofs at its head office of the death of the said John W. Morrison during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part hereof:

"The annual premium of eighty-seven dollars and ninety-two cents shall be paid in advance on the delivery of this policy, and thereafter to the company, at its head office in the City of New York, on the sixteenth day of June in every year during the continuance of this contract, or until premiums for twenty full years shall have been duly paid to said company.

"The receipt of the first payment of premium hereon is acknowledged.

"In Witness Whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary, at its office in the City of New York, the sixteenth day of June A. D. one thousand nine hundred and four." (Signed by president and secretary.)

On the back of the policy were printed, "Provisions, Requirements, and Benefits". Among others there were the following: "Cash Surrender Value.—After three full years' premiums have been paid, upon legal surrender of this policy, provided such surrender be made either (1) within sixty days after the non-payment of any subsequent premium on its original due date, or (2) at any time after twenty full years' premiums have been paid, the company will pay therefor, within sixty days from the date of such surrender, the amount provided for in the Table of Guarantees on the opposite page for the end of the last completed policy year; deducting any unpaid loan hereon. * * *

"Notice.—No person except an Executive Officer of the Company or its Secretary at its Head Office in New York, has power on behalf of the company to make, modify or alter this contract, to extend the time for paying a premium, to bind the company by making any promise or by accepting any representation or information not contained in the application for this contract. Any interlineations, additions or erasures must be attested by the signature of one of the above named officers. Proofs of death will be required on the forms prescribed by the Company which will be furnished on request.

"Assignments.—The company declines to notice any assignment of this policy until the original assignment, or a duplicate or certified copy thereof shall be filed in the company's head office. The company will not assume any responsibility for the validity of an assignment."

A stamp at the bottom of the same page was: "Change of Beneficiary—The insured may, from time to time during the continuance of this policy change the beneficiary or beneficiaries by written notice accompanied by this policy to the company at its head office in New York City; and such change shall take effect upon the endorsements of such change on this policy by the company provided the policy is not then assigned. This policy will be returned after such endorsement. W. J. Easton, Secretary."

Attached to the policy was "This Application". It was signed by John William Morrison. Items 9 to 12 and answers were as follows:

"9. The full name of the person to whom the insurance is payable is Julia Frances Morrison.

"10. Residing in 214 E. 8 St. Leadville, Colo.

"11. The relationship of said beneficiary to me is Wife.

"12. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is None." Stamped on the back of the application were the words, "Beneficiary option to insured." Except as we have mentioned, the word "beneficiary" is not used in the policy. The plaintiff did not sign the application nor did any one expressly sign it for her.

[1] The plaintiff claims the insurance contract was given her by her husband, the insured. The court found the fact against her. That finding is supported by the record. The plaintiff testified that Johnson, a soliciting agent of the defendant, called at her home. She asked him to return. He did so and brought a blank application. It was executed in the presence of the plaintiff by her husband. In it the deceased stated in reply to a question that plaintiff had no interest except she was his wife. On the outside there was stamped, "Option to change beneficiary". The policy was, by the head office, mailed to Johnson. He delivered it to plaintiff. There was stamped on the policy the clause authorizing the insured to change beneficiaries. The plaintiff testified she put the policy in her trunk and so retained possession for fourteen years. No objection to either of said clauses was made. The policy contained a clause permitting an assignment. No assignment was ever made or attempted. The plaintiff testified to her statements made to Johnson. The application blank recited he was a soliciting agent. There is no claim said statements or any of them were communicated to any executive officer. The finding against a gift was fully supported.

[2] Closely allied to the contention just stated the plaintiff asserts that from the time the policy was received at Leadville until 1918 she had possession of it. She asserts also that she paid all of the premiums. In an action in equity between different persons claiming to be beneficiaries such facts might be of help. In re O'Neill's Estate, 143 Misc. 69, 255 N.Y.S. 767, 775. But in an action against an insurer those facts are wholly immaterial. Bradshaw v. Mutual Life Ins. Co., 205 N.Y. 467, 470, 98 N.E. 851. True it is that in some of the cases we find the expression: "The important feature in this statute, as interpreted by the Appellate Division and the Court of Appeals, is not who negotiates and actually procures the insurance policies to be issued, but who pays the premiums." Chatham Phenix Nat. Bank & Trust Co. v. Crosney, 251 N.Y. 189, 193, 167 N.E. 217, 218. But that language is addressed to that portion of section 52 of the Domestic Relations Act of New York Consol.Laws N.Y., c. 14, which prevents the insured who pays premiums from thus defrauding his creditors by diverting moneys, that are justly due creditors, into gifts of insurance to certain beneficiaries.

[3] Again she testified she told Johnson her husband had given her the policy and that it was her property and she was taking out the insurance on her husband's life. A cursory inspection of the document shows it was a policy written on the application of the husband on his life and that it was his and not her contract. Manifestly the parol conversations were superseded by it, Civ.Code, § 1625, and it was and remained his contract. As such it could be modified or altered only by a written contract, Civ.Code, sec. 1698, signed by an executive officer or the defendant's secretary.

[4] Again, she contends her husband had no right to surrender the policy and demand payment under the cash surrender option without her consent. The policy speaks for itself. It contains not a single word to the effect that, to accept any one of the options provided in the policy, the insured was bound to obtain the consent of the beneficiary. Therefore such consent was not necessary. Baley v. Prudential Ins. Co. of America, 147 Misc. 488, 263 N.Y.S. 244, 252; Wagner v. Thieriot, 203 App.Div. 757, 197 N.Y.S. 560, 565.

[5, 6] The foregoing proposition the plaintiff earnestly controverts. She cites and relies on a number of authorities. It will serve no useful purpose for us to take up and discuss each one. Holder v. Prudential Ins. Co., 77 S.C. 299, 57 S.E. 853, was overruled in Antley v. New York Life Ins. Co., 139 S.C. 23, 137 S.E. 199, 60 A.L.R. 184. Quist v. Western & Southern Life Ins. Co., 219 Mich. 406, 189 N.W. 49, was overruled in La Londe v. Roman Standard Life Ins. Co., 269 Mich. 330, 257 N.W. 834. In Colorado the rule seems to be with the contention of the plaintiff, Hill v. Capitol Life Ins. Co., 91 Colo. 300, 14 P.2d 1006, but that decision was by a divided court and is not controlling. Traveler's Ins. Co. v. Healy, 25 App.Div. 53, 49 N.Y.S. 29, involved a policy similar to the one before us. The court held the insured had the right, without consulting the beneficiary, to surrender it and accept the option converting it into cash. That case was followed and approved in Moskowitz v. Equitable Life Assur. Soc., 252 App. Div. 75, 297 N.Y.S. 45. That where a policy reserves the right to change the beneficiary, or to assign it without the consent of the beneficiary, the assured may assign the policy without the consent of the beneficiary, is the established law in

America. Antley v. New York L. Ins. Co., 139 S.C. 23, 137 S.E. 199, 60 A.L.R. 184, and note p. 193. Since the briefs in this case were filed, or at least since the reply brief was in course of preparation, the subject-matter we are now discussing was presented to the court of appeals of New York in Davis v. Modern Industrial Bank, 279 N.Y. 405, 18 N.E.2d 639. In that case the examination made was most exhaustive. A very large number of authorities were collected and classified. On page 641 of 18 N.E.2d, the court said: "Many other cases hold that where the right to change the beneficiary has been reserved by the insured, he becomes the beneficial owner of the policy and may do with it as he pleases, and that the beneficiary has only an expectancy or a vested interest which may be divested by his death previous to that of the insured, or by the exercise by the insured of his reserved right to change the beneficiary." (Citing numerous authorities.)

[7] But the plaintiff asserts her husband could not accept the cash surrender option until he first caused the name of the beneficiary to be changed. That assertion is also without foundation. The authorities are in accord that it was not necessary to take that roundabout course. La Londe v. Roman Standard Life Ins. Co., supra; Connecticut Mut. Life Ins. Co. v. Stewart, D.C., 22 F.Supp. 68 affirmed 1 Cir., 102 F.2d 147; Rawls v. Penn Mut. Life Ins. Co. of Philadelphia, 5 Cir., 253 F. 725, 727.

As noted above the policy provided that the premiums and the policy should be paid at the office of the defendant in New York. The plaintiff calls those provisions to our attention and claims the contract was to be performed in New York and therefore it is to be interpreted under the laws of New York, Civ.Code, sec. 1646. Continuing, she cites and relies on section 22 of the Domestic Relations Act (1 Cumming & Gilbert's General Laws and Other General Statutes of New York, 1099). That section, as it stood when the contract in suit was made, was as follows:

"Section 22. Insurance of Husband's Life.—A married woman may, in her own name, or in the name of a third person with his consent, as her trustee, cause the life of her husband to be insured for a definite period or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property. * * * The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband, or to his, her, or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children, to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter, leaving no descendant surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

"A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her or her legal representative, with the written consent of the assured." It was enacted to obviate the rules of common law regarding the disabilities of married women and to protect them against their husband's debts. Eadie v. Slimmon, 26 N.Y. 9, 17, 82 Am.Dec. 395. It is manifest that on its face it contains nothing changing any rule herein set forth. The first sentence is addressed to contracts applied for by the wife. In Bradshaw v. Mutual Life Ins. Co., 205 N.Y. 467, 98 N.E. 851, the application was made in the name of the wife. The court said (205 N.Y. page 470, 98 N.E. page 852): "The policy of insurance, upon which the plaintiffs seek to recover, was a contract with the wife of the testator and, though procured by him for her benefit, he was acting as her agent and represented her. It was immaterial that he paid the premiums and retained possession of the policy; those facts did not affect the contract as one with her alone. He acquired neither interest in, nor power of disposition over, the policy. His relation to it was that of the life insured, while hers was that of the legal holder in whom solely was vested the interest." Cases involving insurance applied for by the wife are not helpful because in the instant case the record shows the contract in suit was applied for by the husband. Other parts of the section are not so limited, and it has been held that, as to such other provisions, they are applicable to policies applied for by the husband. Anderson v. Northwestern Mut. L. Ins. Co., 261 N.Y. 450, 452, 453, 185 N.E. 696. We have examined all of the cases cited by the plaintiff, and many others which involved insurance applied for by the husband, and we do not find one that holds said statute contains anything at variance with what we have said. White v. White, Sup., 194 N.Y.S. 114; Bradshaw v. Mutual Life Ins. Co., 187 N.Y. 347, 350, 80 N.E. 203, 10 Ann. Cas. 266; United States Trust Co. v. Mutual Ben. Life Ins. Co., 115 N.Y. 152, 21 N.E. 1025; Wagner v. Thieriot, 203 App. Div. 757, 764, 197 N.Y.S. 560, affirmed 236 N.Y. 588, 142 N.E. 295; Anderson v. Northwestern Mut. L. Ins. Co., supra. In the second case cited the application was made by the husband. The court said (187 N.Y. page 350, 80 N.E. page 204, 10 Ann.Cas. 266): "The policy was the contract of Robert C. Bradshaw with the defendant. Both Robert C. Bradshaw and the defendant, being competent to contract, were free to make such contract as they could agree upon."

[8] From what has been said above we think the authorities, if not in entire agreement, support the proposition that under the facts plaintiff's husband had the right, without her consent, to surrender the policy and receive the cash value under the clause hereinabove quoted. The proceeds were paid by check drawn in favor of both husband and wife. Her name was signed on the back. The court found such signature was a forgery. But, as the husband had a right, without plaintiff's consent, to collect the moneys, and did do so, it is immaterial whether her signature was forged by him or by some one else, she was not injured. The defendant was the only person who could complain, but it did not do so.

[9] The plaintiff offered certain proof which the trial court refused to allow and she complains of the ruling. The said offer was to the effect that in the year 1924 plaintiff's husband was in San Francisco; the plaintiff and her husband went to the office of the defendant and there they discussed with the persons behind the desk the terms of the policy on the subject of the payment of the cash surrender value, and the next day the plaintiff went back and held a further conversation; that said persons told her the cash surrender value was not payable except on an application therefor signed by the plaintiff. The defendant objected on the ground the persons spoken to were not identified and the authority of said persons was not defined and the proof was contrary to the provisions of the policy. The court did not err in refusing to accept the offer.

[10] The trial court found the plaintiff's action was barred by the provisions of subdivision 1 of section 339, and section 343 of the Code of Civil Procedure. The record does not show when the action was commenced. In support of the judgment, this court must assume on such a record that the court correctly found those facts.

The judgment appealed from is affirmed.

I concur: SPENCE, J.

---

34 Cal.App.2d 33

## BAER et al. v. TIPPETT.

Civ. 2311.

District Court of Appeal, Fourth District, California.

July 28, 1939.

**1. Licenses 🔑39**

A contract to perform architectural services in violation of statute prohibiting practice of architecture without certificate, unless person furnishing plans and specifications informs other party to building contract in writing that he is not architect, is void. St.1929, p. 138.

**2. Licenses 🔑11(4)**

A contract to prepare plans and specifications for and construct building in capacity of architects and builders and furnish owner complete set of plans and specifications free of cost, except for printing, in consideration of fee of certain percentage of net cost of work, called for architectural services to be paid for, and hence was within purview of statute prohibiting practice of architecture without certificate, unless person furnishing plans and specifications informs other party to building contract in writing that he is not architect. St.1929, p. 138.

**3. Licenses ⚷39**

Building contractors, preparing plans and specifications with assistance of architects' draftsman and having them checked by licensed architect, whom they paid for such service, did not sufficiently comply with statute prohibiting practice of architecture without certificate unless person furnishing plans and specifications informs other party to building contract in writing that he is not architect. St.1929, p. 138.

**4. Licenses ⚷39**

The giving of building contractors' card, describing them as "General Contractors," to one for whom they contracted to furnish plans and specifications for and construct buildings, was not sufficient compliance with statutory requirement that person proposing to furnish plans and specifications without having architect's license notify other party to contract in writing that he is not architect. St.1929, p. 138.

**5. Licenses ⚷7(1)**

The statutory requirement that person proposing to furnish building plans and specifications without having architect's license notify other party to construction contract in writing that he is not architect is constitutional as against contention that statutory object of preventing dangers arising from defects in plans or construction could be sufficiently attained by requiring merely oral notice. St.1929, p. 138.

**6. Licenses ⚷39**

The benefits of statute prohibiting practice of architecture without certificate, unless person furnishing building plans and specifications informs other party to construction contract in writing that he is not architect, cannot be waived, as such statute was adopted as matter of public policy to further public interest. St.1929, p. 138.

**7. Licenses ⚷39**

A contract to prepare plans and specifications for and construct buildings was entire, not severable, so as to preclude building contractors without architect's licenses from recovering for their services as contractors, as well as for architectural services, after owner's breach of contract. St. 1929, p. 138.

---

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Paul M. Baer and another against W. H. Tippett to recover damages for breach of a contract for architectural services and construction of buildings for defendant by plaintiffs. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Courtney A. Teel, of Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment of dismissal following an order granting a motion for a nonsuit.

On November 24, 1936, the parties to the action entered into a written contract in which the plaintiffs agreed to prepare plans and specifications, to act in the capacity of architects and to construct a residence and other buildings for the defendant. The preparation of the plans proceeded for several months and up to May 1, 1937, on which date certain changes therein were made. Shortly thereafter, the defendant requested a radical change in the terms of the agreement, which request was refused by the plaintiffs. This led to a situation where no further work was done under the contract and the plaintiffs brought this action to recover damages in the amount of the compensation provided for in the agreement. A nonsuit was granted and this appeal followed.

[1] The nonsuit was granted on the ground that the contract in question was void as being in violation of the act to regulate the practice of architecture, Stats. 1929, p. 138, which provides that it shall be unlawful for any parties to practice architecture in this state without a certificate unless the person furnishing plans, specifications, etc., for a building shall, prior to accepting employment or commencing work on such plans and specifications, inform the other party, in writing, that he is not an architect. It is well settled that a contract for architectural services to be performed in violation of the terms of the statute is void. Binford v. Boyd, 178 Cal. 458, 174 P. 56; People v. Allied Architects' Assn, 201 Cal. 428, 257 P. 511; Payne v. De Vaughn, 77 Cal.App. 399, 246 P. 1069; Jones v. Wickstrom, 92 Cal.App. 292, 268 P. 449; Meyer & Holler v. Bowman, 121 Cal.App. 112, 8 P.2d 936.

[2] While it is conceded that neither of the appellants were licensed architects it is first contended that the contract here sued

upon does not come within the purview of this statute. It is argued that this was merely a building contract between an owner and a licensed general contractor, that the plans and specifications called for were incidental to the main contract, that no charge or obligation arose from the preparation of the plans and specifications since these were to be furnished free, and that this case comes squarely within the rule laid down in Jones v. Tufts, 118 Cal. App. 694, 5 P.2d 625. In that case the plans and specifications had been drawn before the contract was entered into, there was no attempt to recover for architectural services, and the court held that the contract there in question was one to pay for materials and labor used in constructing the building.

In the instant case, the contract is somewhat different. After reciting that the first party desires to erect a certain residence and other buildings, it proceeds: "Whereas, First Party desires to enter into an agreement with Second Parties, under the terms of which they will prepare the plans and specifications for such residence and buildings, and will construct same and do such other work as may be necessary to fully carry out the wishes of the First Party."

It then proceeds to set forth what each party agrees to do, the first being as follows: "Parties of the Second Part shall act in the capacity of architects and builders of the above-mentioned residence and buildings, and shall furnish unto First Party, free of any and all cost or expense whatsoever, with the exception of Printing, to First Party, within ninety (90) days from the date hereof, a complete and detailed set of plans and specifications for such residence and buildings and other work to be done under this contract. Second Parties will, upon request of First Party, within a reasonable number of days from the date of such request, furnish unto First Party, free of any and all cost or expense whatever, with the exception of Printing, to him, such other, further and additional plans and specifications as may be necessary to First Party, in order that said First Party may be fully satisfied with the plan and arrangement of the aforesaid residence and other buildings and work."

The contract then provides that when the first party is satisfied with the plans and specifications he shall indorse his approval in writing thereon; that within thirty days thereafter the second party shall secure bids for necessary lumber and other material; that the second parties shall commence actual construction on or about April 1, 1937, and shall furnish scaffolding, tools and certain other equipment; that they shall construct the building in strict compliance with the plans and specifications; that they shall pursue the work with due diligence and take all necessary precautions to fully protect the buildings and property of the first party; and that they shall devote all of the time necessary "to the work herein contemplated." Among other things, the first party agrees to pay the second parties 12-½% of the actual net cost of the work and that this "fee of 12-½% of actual net cost shall be the only sum to which Second Parties shall be entitled for their services in connection with the work herein contemplated." It is then provided that the term "actual net cost" shall not include certain things including, among other things, the cost of operating hoisting apparatus, the cost of scaffolds and tools, and the cost of labor and materials "in connection with the preparation by second parties of the plans and specifications hereinbefore required, with the exception of printing." It is then provided that in the event the second parties should refuse or neglect to diligently proceed with such work, the first party shall have the right to take over the construction, and that in this event the second parties shall receive as their only compensation for their labor and services and for "plans" and "specifications" a sum equal to 12-½% of the actual net cost of construction up to that time.

The clause last referred to specifically provides that in the event "a forfeiture be declared" a fee of 12-½% of the actual net cost up to that time shall be paid to the appellants as compensation for all of their labor and services, including the preparation of the plans and specifications. The contract had theretofore provided that the fee of 12-½% of the actual net cost, which the appellants were to receive, was to be in full compensation for all their services "in connection with the work herein contemplated." The work therein agreed to be done included not only the construction of the buildings, but the preparation of plans and specifications. It does not seem reasonable that the parties, having expressed the intention that in case of part performance and part payment the designated fee should compensate the appellants for the preparation of the plans and specifications as well as for their work in constructing the buildings, should have intended that this fee should not compensate the appellants for the preparation of the plans and specifications in the event the work was all done and the full fee became due. The contract throughout provides that this fee shall be in full compensation for all services performed by the appellants. It recites that the contract is entered into to the end that under its terms the appellant "will prepare the plans and specifications" and will construct the building. The first paragraph of the actual agreement provides that the appellants shall "act in the capacity of architects and builders". One of the capacities in which an architect commonly, and perhaps usually, acts is in overseeing the work of actual construction, checking the materials used, and seeing that the plans and specifications are followed and complied with. This is an important part of the work of an architect. In fact, usually, the fee of an architect is considerably reduced when that part of his service is not to be performed. This contract contains many provisions indicating that this part of the usual service of an architect was to be performed in this instance, in addition to the work of drawing the plans and specifications. The contract as a whole indicates that the fee agreed upon was to be paid to appellants for all of their service, including both of the kinds of service usually supplied by an architect and the service usually supplied by a contractor.

The appellants, however, maintain that this fee was to cover only their services as a contractor and that the contract did not contravene the statute forbidding the practice of architecture without a license, except upon written notice, because it was therein provided that any services which they were to render as architects were not to be paid for. This is based upon a part of the first paragraph of the actual contract, which provides that the appellants shall furnish to the respondent free of cost, except for the cost of printing, one complete set of plans and specifications. The appellants interpret this as providing that there shall be no compensation for architectural services. We think it may not be so taken, especially since it must be considered in connection with many other parts of the contract which indicate a contrary intention. Even if it were provided that no charge should be based upon the preparation of the plans and specifications there would still remain many things to be done by the appellants in the doing of which they would act in the capacity of architects, as that expression is usually understood and accepted. Moreover, we think the portion of the contract thus relied upon does not provide that the preparation of the plans and specifications shall be done free of cost to the respondent. Aside from the other matters which we have referred to, indicating a contrary intention, this portion of the contract merely provides that the respondent shall receive free of cost, except for printing, one complete set of plans and specifications. This is far from saying that no compensation is to be paid for the work of preparing all of the plans and specifications. That work is considerable, it ran over a period of many months in this instance and the appellants state in their brief that, at the time the contract was broken, the appellants had performed "the major portion of all they undertook so to do under the terms of said agreement". Only one set of plans and specifications was to be furnished the respondent and he was to pay for the printing of that set. The printing of one set of plans and specifications after they have been completed is a small matter in comparison with the work involved in preparing such plans and specifications. Not only did the general terms of the contract indicate that the work of preparing the plans and specifications was included in the compensation provided for, but the clause of the contract relied upon by the appellants, by specifically providing that only the one set shall be furnished free of cost, indicates that the numerous other sets which would be required in connection with the construction of the buildings, and the work involved in preparing the plans and specifications originally, were not to be furnished free. The reasonable construction of the contract as a whole is that all of these services, which unquestionably constitute the practice of architecture, were, together with the other service to be rendered by the appellants as contractors, to be paid for by the fee named in the contract. The contract called for architectural services which were to be paid for and was, therefore, within the purview of the statute.

[3] It is next contended that in any event the requirements of the statute were complied with since the appellants had the plans checked by a licensed architect. In

this connection the appellant Paul M. Baer testified that he had a licensed architect check and approve the plans after they were prepared, that this architect "spent some hours checking the plans", and that "we paid him $15 for this service". The testimony shows that the preparation of the plans extended over a period of nearly six months and the appellant Harold E. S. Baer testified "I prepared the plans and specifications with the assistance of a draftsman named Simons, who has worked in many architects' offices." We think this is not a sufficient compliance with the statute. Meyer & Holler v. Bowman, supra.

[4] The next contention is that the appellants sufficiently complied with the statute by handing the respondent their business card, which read: "Paul M. Baer & Son, General Contractors." The fact that they were contractors does not necessarily indicate that they were not architects and the giving of this card cannot be held to have been a sufficient compliance with the plain requirement of the statute that the other party be notified in writing that the person proposing to furnish the plans and specifications was not an architect.

[5] It is next urged that the statute, in requiring written notice, is unconstitutional. It is argued that the statute could only be upheld upon the theory that it was in the public interest in that it tended to prevent the dangers which might arise from defects in plans or construction (citing Binford v. Boyd, supra), and that that object could be sufficiently attained by requiring merely an oral notice. We are not impressed with this argument. In the case referred to, the constitutionality of the statute as it then existed was upheld and it cannot be said that the object sought to be attained is not furthered by providing that the required notice shall be given in a definite form that may remove any doubt as to whether or not it was given.

[6] It is further urged that the respondent waived the benefits of this statute. The statute in question was adopted as a matter of public policy and for the purpose of furthering the public interest. Under such circumstances there can be no waiver of the kind relied on. Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31.

[7] Some contention is made in the closing brief that the contract here in question is severable and divisible, and that the appellants in any event were entitled to recover with respect to that part of the contract which called for their services as contractors. The contract had but a single object, construction of certain buildings, and the two kinds of services called for were thoroughly intermingled. The parts are inter-dependent and there is a common consideration which is clearly based upon a completed whole. In our opinion, the contract was entire, and not severable. Kennard v. Keeler, 93 Cal.App. 722, 269 P. 1114.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

34 Cal.App.2d 41

## BUSHEY v. RIGBY.

Civ. 11795.

District Court of Appeal, Second District,
Division 1, California.

July 31, 1939.

**1. Appeal and error 🔑1008(1)**

In pedestrian's action for injuries sustained when pedestrian was struck by automobile while crossing boulevard at night at place other than a crosswalk, whether pedestrian was contributorily negligent in stepping off curb, after observing that approaching automobile was zigzagging in an erratic manner, was question of fact for trial judge sitting without a jury.

**2. Appeal and error 🔑1011(1)**

A finding of trial judge sitting without a jury that pedestrian who was struck by automobile was contributorily negligent was binding upon appellate court, where based on conflicting evidence.

**3. Automobiles 🔑244(35, 50)**

In pedestrian's suit for injuries sustained when pedestrian was struck by automobile while crossing boulevard at night at place other than a crosswalk, evidence that approaching automobile was zigzagging and that pedestrian observed the erratic man-

**ner in which automobile was being driven, but nevertheless stepped off curb to cross street, sustained finding of negligence on part of motorist and of contributory negligence on part of pedestrian.**

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Sarah J. Bushey against George Rigby for injuries sustained when plaintiff, a pedestrian, was struck by an automobile driven by defendant. From judgment for defendant, plaintiff appeals.

Affirmed.

Glenn M. Hershner, of Van Nuys, for appellant.

Schell & Delamer, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by the plaintiff from a judgment rendered by the trial court sitting without a jury, wherein the court found that the defendant "carelessly and negligently drove and operated his automobile so that it was caused to collide with the plaintiff, and that the plaintiff sustained certain injuries as the result of coming in contact with said defendant's automobile * * * that the plaintiff, Sarah J. Bushey, was herself careless and negligent and failed to use that degree of care and caution for her own safety which would have been used under similar circumstances by an ordinarily prudent person, and that plaintiff negligently and carelessly left a position of safety and carelessly and negligently walked onto the boulevard and into the path of defendant's oncoming vehicle, and failed to yield the right of way to the automobile at a time when she was endeavoring to cross such street at a place other than a crosswalk, and that each and all of said careless and negligent acts on the part of the plaintiff proximately contributed to the happening of the accident and the injuries she sustained."

Appellant urges that there was no showing of contributory negligence on her part; that the evidence is insufficient to justify the decision and that the decision is contrary to law.

The accident occurred between the hours of 6 and 7:30 o'clock of the evening of February 15, 1937, at a point on Van Nuys boulevard 250 to 300 feet north of its intersection with Van Owen street, which is about three-quarters of a mile north of the city of Van Nuys. Said boulevard runs in a general northerly and southerly direction and is divided into two lanes, each of which is 28 feet in width, by the Pacific Electric Railway Company's private right of way which traverses the center of said boulevard. Appellant was living on the west side of the boulevard and on the evening in question she left her house to go to a certain drug store located on the opposite side of the highway a distance variously estimated as between 50 and 120 feet north of the northeast corner of Van Nuys boulevard and Van Owen street. Appellant crossed the westerly half of Van Nuys boulevard and also the railway right of way, and then waited on the westerly curb of the easterly half of the boulevard for an automobile to pass. While so waiting, she testified that she noticed respondent's automobile, which was traveling in a northerly direction toward the point where she was standing, make a zigzagging motion. She testified that the car made one zigzag in the fifty feet south of the drug store, made another zigzag opposite the drug store, at which time it was very close to the west curb on the east half of the boulevard; that respondent then straightened his course and continued in a straight line for about fifty feet, and when said car was about 125 feet south of the point where she was standing, appellant stepped down from the curb and walked about two feet into the highway. When respondent's car was about 75 feet from appellant, it again swerved to the left toward her, whereupon she turned to retrace her steps, but before reaching the curb she was struck by respondent's car thereby sustaining serious and painful injuries. According to one witness, respondent's car after striking appellant jumped the curb and traveled through soft plowed ground on the railway right of way a distance of approximately 132 feet before coming to a stop. The night was dark and there were no lights at the point of the impact, the nearest lights being those in the drug store on the east side of the boulevard which sets back about 120 feet from the highway.

With respect to her realization of the existence of danger as she waited on the curb watching respondent's car appellant on cross-examination testified as follows:

"Q. Now, as you were standing upon the right of way you noticed the car was zigzagging? A. Yes, sir.

"Q. And you felt that there might be some danger of that car coming down that road? A. I did not know whether it would be there or not. After the car got in the car lane again I didn't know whether he would just go right on down or whether he would do the same thing or not. I didn't know.

"Q. In other words, you were wondering whether he might do the same thing over or whether he would go straight down? A. Yes.

"Q. And that was, of course, before you stepped down from the curb? A. I stepped down from the curb when he was back in the car lane again.

"Q. Yes. But I mean, after you noticed him driving straight you were still wondering whether he might do this same thing over again? * * * A. Well, I didn't know whether he would or not. I was just undecided.

"Q. You were undecided. And you were still undecided about that when you stepped off the curb into the street, weren't you? A. I didn't go any further than the two feet, but I was watching for him. * * *

Q. * * * You were still undecided about whether he was going to zigzag again? A. Yes, I didn't know whether he would zigzag or not again.

"Q. When you stepped off into the street? A. Yes. * * *

"Q. How far did he go in a straight line from the point where you stepped down to the point where he swerved toward you? A. Well, I said approximately 50 feet * * * I am not sure of that exactly.

"Q. In other words, after you stepped down he traveled about 50 feet in a straight line? A. In a straight line, yes.

"Q. And then he suddenly swerved? A. Toward me."

The witness Suess testified that respondent passed the car in which said witness was riding at a point about 200 feet south of the drug store "and the motion was a little haphazard"; that respondent had to zigzag "had to go around, you know, he had to go around in front of us * * * there was a little uncertainty about it, a zigzag motion".

Respondent testified that he was driving in a northerly direction at a speed of 35 or 40 miles per hour in the middle of the east half of Van Nuys boulevard, and that he saw appellant 50 or 60 feet ahead of him, "when she got into view of my lights * * * more toward the middle of the street than she was to the west side * * * and to avoid hitting her I swerved to the left * * * when I started swerving to the left she started back to the west curb in the path or direction my car was going. * * * I cut it as hard as I could and just about then I hit the curb. * * * I didn't even know I hit the woman until I got out of my car and went back and saw her lying in the street. * * * when I saw her in the street there before I went over the curb I didn't exactly know if I had hit her or not and of course I went back to see what happened."

Respondent denied that he was zigzagging at the time the accident occurred; and said the only dent he discovered in his car that night was a place about four or five inches up from the running board on the back right fender.

The witness Griffin, who was driving south on the west half of the boulevard which lies west of the railway right of way, testified that appellant was lying in the street six or seven feet out from the curbing; that he looked at respondent's car and there were no dented places on it except a place about knee-high on the right rear fender. The witness McCulley testified that he saw appellant lying in the street six or seven feet from the west curb and helped to move her closer to the said west curb.

Appellant contends that the facts in this case are undisputed that respondent was guilty of negligence which was the proximate cause of appellant's injuries, "and that there is no inference from the evidence that appellant was guilty of contributory negligence, therefore, the question of contributory negligence is one of law, which should be decided in favor of appellant". In support of this theory, appellant quotes from the case of Hanson v. Cordoza, 106 Cal.App. 500, at page 502, 290 P. 62: "When the facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn from such facts, then, and only then, is the question of negligence or contributory negligence one of law."

In the case of Flach v. Fikes, 204 Cal. 329, at page 332, 267 P. 1079, at page 1080, it is stated: "Contributory negligence is an affirmative defense, and it must be pleaded and proven by the defendant. Unless the evidence on the part of the plaintiff shows that the injured party was guilty of contributory negligence, the defendant must show by a preponderance of the evidence that said injured party was guilty of such negligence. * * * It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. If that were so, he never could attempt to cross a street upon which automobiles are being operated, and consequently, where there is almost always an approaching machine. He has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; * * * Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908; * * * Schneider v. Market Street Ry. Co., 134 Cal. 482, 488, 66 P. 734."

[1, 2] Under the facts revealed by the record herein, it was obviously a question of fact for the determination of the trial judge whether appellant was contributorily negligent when she stepped off the curb in the face of the erratic manner in which, according to her own testimony, respondent was operating his automobile. The trial court having decided the question against her, this court is now powerless to intervene.

[3] The evidence is sufficient to justify the trial court's decision.

For the foregoing reasons, the judgment is affirmed. The appeal from the order denying appellant's motion for new trial is dismissed.

We concur: DORAN, P. J.; WHITE, J.

---

34 Cal.App.2d 26

## STONEMAN et al. v. FRITZ.

Civ. 2429.

District Court of Appeal, Fourth District, California.

July 28, 1939.

**1. Venue 🔑5(4)**

The Superior Court of Los Angeles county had jurisdiction of action to quiet title to two parcels of realty, one situated in Los Angeles county and one in San Bernardino county. Code Civ.Proc. § 392; Const. art. 6, § 5.

**2. Pleading 🔑291(2)**

Where plaintiff fails to file an affidavit, as required by statute, denying genuineness and due execution of a writing relied upon as a defense, a copy of which is set forth in or attached to answer, the genuineness and due execution are deemed admitted, including the facts that the copy is a true copy of the original instrument which is a genuine document, signed by the party whose signature it bears and that it was legally delivered. Code Civ.Proc. § 448.

**3. Pleading 🔑291(2)**

The admission of genuineness and due execution of a writing relied upon as a defense by failure of plaintiff to file affidavit of denial as required by statute does not prevent an attack upon the writing on other proper grounds, nor does it affect the rule that weight and sufficiency of evidence are for trial judge or the rule that legal effect of the writing is for the trial judge. Code Civ.Proc. § 448.

**4. Pleading 🔑291(2)**

In action by plaintiff as administratrix of deceased's estate and in her own right to quiet title to realty claimed by defendant under certain deeds from deceased, the genuineness and due execution, including delivery, of the deeds were deemed admitted by failure of plaintiff to file affidavit of denial as required by statute, notwithstanding the deeds were not signed by plaintiff. Code Civ.Proc. § 448.

**5. Pleading 🔑291(2)**

In action to quiet title to realty claimed by defendant under certain deeds, copies of which were attached to answer and genuineness and due execution of which were not denied by plaintiff by affidavit as required by statute, evidence to show that the deeds had not been legally delivered to defendant was inadmissible, since genuineness and due execution including delivery of the deeds were deemed admitted by plaintiff's failure to file the affidavit. Code Civ.Proc. § 448.

**6. Pleading ⚷291(2)**

On appeal from judgment for plaintiff in action to quiet title wherein defendant relied on certain deeds the genuineness and due execution of which plaintiff failed to deny by affidavit as required by statute, appellate court was required to disregard finding of fact by trial judge that the deeds had not been legally delivered to defendant, since legal delivery was an admitted fact established by the pleadings due to plaintiff's failure to file the required affidavit. Code Civ.Proc. § 448.

**7. Quieting title ⚷47(2)**

In action to quiet title to realty claimed by defendant under certain deeds, genuineness and due execution, including delivery, of which were admitted by failure of plaintiff to file affidavit of denial as required by statute, trial court's findings of fact were insufficient to support judgment for plaintiff when findings that deeds had not been legally delivered were disregarded because contrary to the admitted fact of legal delivery. Code Civ.Proc. § 448.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Celia Stoneman, as administratrix with the will annexed of the estate of Dr. Hanna Scott Turner, deceased, and Celia Stoneman, against Pearl H. Fritz to quiet title to realty. From judgment for plaintiffs, defendant appeals.

Reversed.

R. J. Welch, Jr., and H. M. Dougherty, both of Riverside, for appellant.

Nichols, Cooper & Hickson and A. L. Hickson, all of Pomona, and Homan & Warner, of Chino, for respondents.

MARKS, Justice.

This is an action to quiet title to two parcels of real property, one in Los Angeles county and one in San Bernardino county. Plaintiffs had judgment and defendant has appealed.

Dr. Hanna Scott Turner, a resident of Los Angeles county, died testate on May 7, 1937, Celia Stoneman and Pearl H. Fritz, nieces of deceased, were appointed and qualified as administratrices of her estate with the will annexed. Celia Stoneman instituted this action as administratrix to quiet the title of the estate in the two parcels of real estate. She joined as plaintiff in her individual capacity to quiet her title, subject to administration and as a devisee under the will of deceased, in the Los Angeles county property. Mrs. Fritz was named in the will as the residuary legatee.

Defendant denied plaintiffs' title and asserted title in herself under two deeds from deceased, true copies of which were attached to her answer and made a part of it by reference. No affidavit denying the genuineness and due execution of these deeds was ever filed.

Over defendant's objections the trial judge permitted plaintiffs to introduce evidence attacking the delivery of the deeds to defendant. Upon such evidence he found there had been no legal delivery of the deeds to defendant.

[1] Defendant urges there was no jurisdiction in the superior court of Los Angeles county to try the title to the San Bernardino county property regardless of the fact that one parcel of the property in controversy was situated in Los Angeles county. There is no merit in this contention. Sec. 5, art. VI, Const.; sec. 392, Code Civ.Proc.; Murphy v. Superior Court, 138 Cal. 69, 70 P. 1070; Kent v. Williams, 146 Cal. 3, 79 P. 527; Middlecoff v. Cronise, 155 Cal. 185, 100 P. 232, 17 Ann.Cas. 1159; Pacific Gas & Electric Co. v. Scott, 10 Cal.2d 581, 75 P.2d 1054; Young v. Young Holdings Corp., 27 Cal.App.2d 129, 80 P.2d 723.

[2] It is well established that where a copy of a writing, relied upon as a defense, is set forth in, or attached to, an answer, and plaintiff fails to file an affidavit denying its genuineness and due execution as required by section 448 of the Code of Civil Procedure, those facts are deemed admitted and need not be proved by defendant. The genuineness and due execution that are admitted include these facts: that the copy is a true copy of the original instrument which is a genuine document, signed by the party whose signature it bears, and that it was delivered in the manner prescribed by law. The cases hereinafter cited support this rule. It has been held that by the failure to file the

affidavit it is also admitted that the instrument was acknowledged in the manner required by law even in the face of a defective certificate of acknowledgment attached to it. Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann.Cas.1912C, 1044.

The difference between the parties before us arises largely from the factual applications to be made to the foregoing rules. Plaintiffs maintain that it is only when a plaintiff's name is subscribed to the instrument set forth in or attached to the answer, and relied upon as a defense, that its genuineness and due execution are admitted by the failure to file the affidavit; that there is no such admission when the instrument is not signed by the plaintiff. Defendant maintains, on the contrary, that the affidavit must be filed in any case where the plaintiff expects to dispute the genuineness or due execution of such a document relied upon in defense of the action.

The trial judge adopted the theory of plaintiffs and, over repeated objections, admitted evidence to dispute the delivery of the deeds. Plaintiffs cite the following authorities as supporting these rulings of the trial judge: Heath v. Lent, 1 Cal. 410; Marx v. Raley & Co., 6 Cal.App. 479, 92 P. 519; Krug v. Warden, 57 Cal.App. 563, 207 P. 696; Miller v. Price, 103 Cal.App. 650, 284 P. 1035; City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87.

The case of Heath v. Lent, supra, was decided under a statute which provided as follows:

"When any complaint or answer is founded on any instrument of writing which is alleged to have been signed by the party, the signature shall be considered as admitted, unless denied by such party on oath. If denied, it may be proved by any proper evidence." (Stats.1850, p. 434.)

Under this statute the supreme court held in Heath v. Lent, supra, that when the instrument relied upon by the defendant was not signed by the plaintiff, the failure to file the affidavit did not admit its genuineness or due execution. Clearly, this was the only construction that properly could be put upon the language of the statute then in effect.

The act of 1850 was repealed in 1851, and section 54 of the Practice Act (Stats. 1851, p. 58) was adopted. In so far as it bears on the question we are considering, that statute is substantially the same as the present section 448 of the Code of Civil Procedure. It provided as follows:

"When the defence to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk five days previous to the commencement of the term at which the action is to be tried an affidavit denying the same."

Marx v. Raley & Co., supra, was decided in 1907. It quoted from Heath v. Lent, supra, and added [6 Cal.App. 479, 92 P. 520]: "In this case, as in that, it would be unreasonable to say that the plaintiff was bound to know the genuineness of the signature of the defendant" which was attached to a letter set forth in the answer. In the Marx case the court took no notice of the changes in the statute. The correctness of the final judgment in that case cannot be doubted as the opinion states that the copy of the letters set forth in the answer was merely explanatory of another letter and was not the written instrument upon which the defense to the action was founded. Section 448, Code Civ.Proc.

Plaintiffs can gain no support from Krug v. Warden, supra. An intervener set forth a copy of a deed in his complaint in intervention. His title came through a tax deed that was based on defective tax proceedings. The court concluded that while the failure to file the affidavit denying the genuineness and due execution of the deed set forth in the answer admitted its genuineness and due execution, it did not admit the further fact that the grantor in that deed had a good title to convey to the grantee.

The case of Miller v. Price, supra, is authority upholding the position of plaintiffs and the questioned rulings of the trial court. It followed Heath v. Lent, supra, without noting the change in the statute or considering any of the decisions which we will hereafter cite.

[3] What was said in City of Los Angeles v. Watterson, supra (8 Cal.App.2d pages 343, 344, 345, 48 P.2d 87) on the question before us here was not necessary to that decision. A conspiracy to defraud was amply proved, and could not have been disproved by a private writing signed only by defendants who were the conspirators. The allegations of the verified com-

plaint challenged the truth of the statements in the writing. The admission of the genuineness and due execution of such an instrument does not prevent an attack upon it on other proper grounds nor does it affect the rule that the trial judge must determine the weight and sufficiency of the evidence. The instrument set forth in the answer in that case, in the form in which it there appeared, merely created a slight conflict in the evidence which the trial judge resolved against defendants. The legal effect of such an instrument is to be decided by the trial judge. Carpenter v. Shinners, 108 Cal. 359, 41 P. 473. Further, this court there remarked that it was not attempting to formulate a general rule for the application of the provisions of section 448 of the Code of Civil Procedure. See, also, Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Singer v. Briggs, 6 Cal.App.2d 665, 45 P.2d 436.

The case of Sloan v. Diggins, 49 Cal. 38, was decided after the adoption of section 54 of the Practice Act which we have quoted. The plaintiff sued for damages to her real property which resulted from street work. The defendant justified under a contract with the street superintendent of the city and county of San Francisco which was not signed by the plaintiff. A copy of the contract was attached to the answer. The plaintiff failed to file any affidavit denying its genuineness and due execution. The Supreme Court quoted section 54 of the Practice Act and said that "the genuineness and due execution of the contract was deemed admitted by the plaintiff".

The rule thus announced in Sloan v. Diggins, supra, has been followed consistently by the Supreme Court in all cases to which we have been cited and which we have found, where the defense was based on a contract, a copy of which was set forth in the answer and which was not signed by the plaintiff. Among those cases we cite the following: Carpenter v. Shinners, supra; Knight v. Whitmore, 125 Cal. 198, 57 P. 891; Clarke v. Fast, 128 Cal. 422, 61 P. 72; Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 89 P. 610; Cordano v. Wright, supra; McKenzie v. Ray, 168 Cal. 618, 143 P. 1018; Denver Stockyards Bank v. Martin, 177 Cal. 223, 170 P. 428; Sharp v. Quinn, 214 Cal. 194, 4 P.2d 942, 78 A.L.R. 501.

The District Courts of Appeal have followed and applied the foregoing rule in the following cases: Bublitz v. Reeves, 40 Cal.App. 75, 180 P. 28; Dyer Law & Collection Co. v. Abbott, 52 Cal.App. 545, 199 P. 340; Bussenius v. Warden, 71 Cal.App. 717, 236 P. 371; Interstate Realty & Improvement Co. v. Clark, 77 Cal.App. 558, 247 P. 244; Bank of America Nat. Trust & Savings Ass'n v. Richardson, 29 Cal.App.2d 554, 85 P.2d 139.

[4] In cases like the one before us where one plaintiff was administrator of the estate of the deceased grantor in the deeds under which defendant claims, and the other plaintiff claimed an interest in the real property in controversy by reason of a bequest in the will of the deceased grantor, we are bound by the cited decisions of the Supreme Court and those decisions of the District Court of Appeal following them. This question is not now open for debate in California. This rule is that where the answer contains or has attached to it a copy of an instrument upon which a defense to the action is founded, if the affidavit required by section 448 of the Code of Civil Procedure is not filed, the genuineness and due execution, including delivery of the instrument, are admitted facts in the case. This is true under these circumstances even though neither plaintiff signed the instrument.

[5, 6] As the delivery of the two deeds to defendant was admitted by the pleadings, no evidence should have been received on that question as it was not an issue in the case. Findings of fact contrary to these facts admitted in the pleadings must be disregarded. 21 Cal.Jur., sec. 106, p. 155. The rule is stated in Welch v. Alcott, 185 Cal. 731, at page 754, 198 P. 626, 636, as follows:

"It was said in Burnett v. Stearns, 33 Cal. 468: 'The finding should be confined to the facts in issue. The province of the court in respect to facts is to determine but not to raise the issue.' See, also, Ortega v. Cordero, 88 Cal. 221, 26 P. 80. 'Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues.' White v. Douglass, 71 Cal. 115, 119, 11 P. 860. It was declared in the Matter of Estate of Doyle, 73 Cal. 564, 570, 15 P. 125, 128: 'When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as "found." * * *

If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous.' See, also, Hutchison v. Barr [183 Cal. 182], 190 P. 799; Sutherland on Code Pleading, § 1167. 'There can be no necessity of a finding as to a fact admitted by the pleadings.'"

[7] It follows that the objections to the introduction of evidence tending to show that the two deeds had not been delivered to defendant should have been sustained. It also follows that the findings that the two deeds had not been delivered to defendant must be disregarded as contrary to admitted facts established by the pleadings. When the findings of the failure to deliver the deeds are disregarded, the findings of fact fail to support the judgment.

The foregoing conclusions make it unnecessary for us to consider the other questions argued by counsel.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

---

36 Cal.App.2d Supp. 748

## PEOPLE v. SMITH.

C. A. 1596.

Appellate Department, Superior Court,
Los Angeles County, California.
Aug. 1, 1939.

**1. Criminal law 🔑13**

A penal statute to be valid must prescribe a reasonably ascertainable standard of guilt.

**2. Automobiles 🔑316**
**Constitutional law 🔑258**
**Criminal law 🔑13**

The statute defining the offense of reckless driving as driving of any vehicle upon a highway "in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property" is not invalid on ground that it is too vague and indefinite to be the basis of a charge of crime or to constitute due process of law because the word "indicate" refers to the effect on the mind of a spectator, since the statute does not declare that the indication to any spectator is to be considered, but merely fails to state to whom the indication is to be made. Vehicle Code, §§ 505, 510, St.1935, pp. 175, 176; U.S.C.A.Const. Amend. 14.

**3. Statutes 🔑47**

A statute is not void for uncertainty if any reasonable and practical construction can be given to its language.

**4. Constitutional law 🔑48**

If the terms of a statute are by fair and reasonable interpretation capable of meaning consistent with the requirements of the Constitution, statute will be given that meaning rather than another in conflict with the Constitution.

**5. Criminal law 🔑254, 737(1)**

Whether a defendant has violated a penal law as charged is always question to be determined from evidence by the judge or jury by whom he is tried.

**6. Automobiles 🔑330, 355(4)**

Under statute defining reckless driving as the driving of any vehicle upon a highway in such manner as to indicate either a willful or wanton disregard for the safety of persons or property, word "indicate" means to point out or to, to direct to a knowledge of, to be an index, sign or token of, to betoken, and among its synonyms are "evidence," "evince" and "manifest," and as so used, there must be such evidentiary relation between the manner of driving and the described state of mind that the judge or jury may properly infer willful or wanton disregard for the safety of persons or property from the manner of driving. Vehicle Code, §§ 505, 510, St.1935, pp. 175, 176.

[Ed. Note.—For other definitions of "Evidence," "Evince," "Indicate" and "Manifest," see Words & Phrases.]

**7. Automobiles 🔑355(4)**

Under statute defining reckless driving as driving any vehicle upon a highway in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property, inference of willful or wanton disregard for the safety of persons or property to be drawn from the manner of driving must be drawn from full information of the facts to be presented to the trier of facts by evidence, not from a mere one-sided or partial view of them. Vehicle Code, §§ 505, 510, St.1935, pp. 175, 176.

**8. Automobiles ⚷316**

The prohibition and punishment laid down by the statute defining reckless driving as an offense are directed at a manner of driving which necessarily includes a series of overt acts capable of observation and narration by witnesses, and a reference to indication of "a willful or wanton disregard for the safety of persons or property" sets up a reasonably certain description of the manner of driving which is prohibited. Vehicle Code, §§ 505, 510, St.1935, pp. 175, 176.

**9. Statutes ⚷47**

To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish details, plans, and specifications of the acts or conduct prohibited.

**10. Criminal law ⚷252(3)**

Complaint filed in municipal court charging offense of reckless driving substantially in the language of the statute without further specification of particulars, except a statement of the date and the city where the alleged offense occurred, was sufficient. Vehicle Code, §§ 505, 510, St.1935, pp. 175, 176; Pen.Code, § 1461a, and § 1426, as amended by St.1931, p. 1656.

**11. Criminal law ⚷252(3)**

The statute providing that a criminal complaint in a justice's court may be in the words of the enactment describing the offense or declaring the matter to be a public offense is valid. Pen.Code, § 1461a, and § 1426, as amended by St.1931, p. 1656.

◆

Appeal from Police Court of City of Santa Monica, Los Angeles County; Milan E. Ryan, Judge.

James W. Smith was convicted of reckless driving, and he appeals.

Affirmed.

Frank J. Indovina, of Santa Monica, for appellant.

Marshall Hickson, of Santa Monica, for respondent.

Ray L. Chesebro, City Atty., W. Joseph McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, amici curiae.

SHAW, Presiding Judge.

The defendant appeals from a judgment convicting him of a violation of section 505, subdivision (a) of the Vehicle Code, St.1935, p. 175. The evidence produced at the trial is not set forth in the record and defendant's only contentions here are that section 505 of the Vehicle Code is unconstitutional and that the complaint is insufficient to charge an offense under it. Section 505 reads as follows: "505. Reckless Driving. (a) Any person who drives any vehicle upon a highway in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving and upon conviction thereof shall be punished by imprisonment in the county jail for not less than five days nor more than ninety days or by fine of not less than twenty-five dollars nor more than two hundred fifty dollars or by both such fine and imprisonment, except as provided in subdivision (b) of this section.

"(b) Whenever such reckless driving of a vehicle proximately causes bodily injury to any person, the person so driving such vehicle shall upon conviction thereof be punished by imprisonment in the county jail for not less than thirty days nor more than six months or by fine of not less than one hundred dollars nor more than five hundred dollars or by both."

[1] The words defining the offense are "drives any vehicle upon a highway in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property". Defendant contends that this definition is too vague and indefinite to be the basis of a charge of crime or to constitute due process of law, and that the statute quoted is therefore in violation of the 14th Amendment, U.S.C.A., and void, citing Herndon v. Lowry, 1937, 301 U.S. 242, 57 S.Ct. 732, 742, 81 L.Ed. 1066, and other cases holding that a penal statute, to be valid, must prescribe a "reasonably ascertainable standard of guilt"; a rule recognized and followed by the California cases. See Hewitt v. Board of Medical Examiners, 1906, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750; In re Peppers, 1922, 189 Cal. 682, 209 P. 896.

[2-7] We conclude that this statute does not come under the ban of this con-

stitutional rule. The principal attack on the certainty of the statute centers around the use of the word "indicate" therein, it being assumed that this word refers to the effect on the mind of a spectator. On this assumption, it is argued that the indications may be as many as the spectators, and may vary according to the opinion of each spectator, and further, that the conduct of the defendant may give different indications according to the point of view of the beholder, so that one having but a partial view of the scene might regard driving as reckless when on a full view it would appear to have been motivated by a high degree of care and caution, and vice versa. We regard the fundamental assumption above mentioned as erroneous, and without it, of course, this argument falls. The statute does not declare that the indication to any spectator is to be considered; it merely fails to state to whom the indication is to be made. "A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language." Pacific Coast Dairy v. Police Court, 1932, 214 Cal. 668, 676, 8 P.2d 140, 143, 80 A.L.R. 1217. "If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." County of Los Angeles v. Riley, 1936, 6 Cal.2d 625, 629, 59 P.2d 139, 141, 106 A.L.R. 903. Such a construction of the statute before us is easily discoverable. Penal statutes like this are enacted to regulate the conduct of those to whom they apply; prosecutions for violation of them are brought before courts and tried by judges or juries. The question whether a defendant has violated the law as charged is always one to be determined from evidence by the judge or jury by whom he is tried. This statute was passed with such a mode of procedure in view. The word "indicate" is defined to mean, "To point out or to; to direct to a knowledge of; * * * to be an index, sign or token of; to betoken," and among its synonyms are "evidence, evince, manifest." Websters New International Dict., Second Ed., 1938. It is used in such a sense in this statute, and its effect is that there must be such evidentiary relation between the manner of driving and the described state of mind—wilful or wanton disregard for the safety of persons or property—that the judge or jury may, under the rules of proof in criminal cases, properly infer the latter from the former. Of course, the intent of the statute is also that the inference shall be drawn, as in every criminal case, from full information of the facts, to be presented to the trier of facts by evidence, not from a mere one-sided or other partial view of them; or, coming closer to the words of the statute, the manner of driving itself, with all its merits or demerits, not merely some persons' partial view of it, must indicate the conclusion stated. In People v. Steel, Cal. Super., 1939, 92 P.2d 815, which we have seen since the foregoing was drafted, a like construction of the word "indicate", as used in this statute, was adopted, and that statute was upheld against the objection that it was invalid by reason of the use of that word therein.

[8] On this construction, the statute is not subject to the criticism which has been made in argument that it penalizes a mere state of mind. The prohibition and punishment laid down by the statute are directed at a manner of driving, which necessarily includes a series of overt acts, capable of observation and narration by witnesses. The reference to a state of mind is merely for a description of the prohibited acts. The question as to the certainty of the statute, then, comes down to this: does the reference to indication of "a wilful or a wanton disregard for the safety of persons or property," set up a reasonably certain description of the manner of driving prohibited? We see no reason to doubt that it does. The words "wilful" and "wanton," as legal terms, have well established meanings, which do not require particular consideration in this case, no question of insufficiency of the evidence being involved, and the other words of this description are in common use and free from ambiguity or variant meanings. In this respect the statute differs from that condemned by the United States Supreme Court in Lanzetta v. State of New Jersey, 1939, 59 S.Ct. 618, 83 L. Ed. ——, to which our attention has been called, for there the word "gang," used without definition, was the governing word of a statute prescribing punishment for gangsters, and the court held the statute void because this word had a great variety of meanings, some of which pointed to conduct of an entirely innocent nature. Nor is the statute at all like that involved in Herndon v. Lowry, supra, 301 U.S. 242, 263, 57 S.Ct. 732, 741, 81 L.Ed. 1066, 1077.

on which defendant relies, for there the statute was condemned because, as the court said, it "involves pure speculation as to future trends of thought and action", and "licenses the jury to create its own standard in each case."

[9] To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. The words of this statute are at least as certain as the statutory language, substantially the same as that now in section 510 of the Vehicle Code, prohibiting driving at a speed "greater than is reasonable and proper" or "at such rate of speed as to endanger the life or limb of any person or the safety of any property" (Stats.1917, p. 404), which was held sufficiently certain in Ex parte Daniels, 1920, 183 Cal. 636, 647, 192 P. 442, 21 A.L.R. 1172; or the statutory phrase "unreasonable waste of natural gas," upheld on this point in People v. Associated Oil Co., 1930, 211 Cal. 93, 108, 294 P. 717, 724; and Bandini Petroleum Co. v. Superior Court, 1930, 110 Cal.App. 123, 138, 293 P. 899; Id., 1931, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 143, 78 A.L.R. 826, 832; or the phrase "diligent effort to find the owner thereof and to restore or return the same," held certain enough for use in a penal statute in Pacific Coast Dairy Co. v. Police Court, supra, 1932, 214 Cal. 668, 676–678, 8 P.2d 140, 143, 80 A.L.R. 1217; or the terms "due caution and circumspection" used in the Penal Code, section 192, sub. 2, in defining manslaughter, which were held sufficiently certain for use without further definition in a jury instruction in People v. Crossan, 1927, 87 Cal.App. 5, 9, 261 P. 531. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Nash v. United States, 1913, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232, 1235. See, also, Sproles v. Binford, 1932, 286 U.S. 374, 393, 52 S. Ct. 581, 76 L.Ed. 1167, 1182; Martin v. United States, 10 Cir., 1938, 100 F.2d 490, 494; Glass v. Board of Medical Examiners, 1920, 50 Cal.App. 389, 195 P. 73; People v. Lavine, 1931, 115 Cal.App. 289, 295, 1 P.2d 496, and People v. Beifuss, 1937, 22 Cal.App.2d, Supp., 755, 758, 67 P.2d 411, where legislative enactments were upheld against the objection of uncertainty and the rules affecting this matter were further discussed.

[10, 11] The complaint here is substantially in the language of the statute, without further specification of particulars except a statement of the date and the city where the alleged offense occurred, and this is attacked as insufficient to charge an offense because too general in its description of defendant's conduct. But proceedings in municipal courts in criminal cases are, by statutory provision, the same as those in justices' courts. Penal Code, section 1461a. By the terms of section 1426, Penal Code, as amended by Statutes 1931, p. 1656, a criminal complaint in a justice's court "may be in the words of the enactment describing the offense or declaring the matter to be a public offense." This is a valid provision (People v. Robinson, 1930, 107 Cal.App. 211, 217, 218, 290 P. 470) and this complaint complies with it. Such a complaint has been approved by the Appellate Department of the San Francisco Superior Court in an unpublished decision to which our attention has been called, on the authority of the case last cited and of Matter of Winston, 1911, 160 Cal. 18, 116 P. 390; In re Von Perhacs, 1923, 190 Cal. 364, 367, 212 P. 689, and In re Berto, 1925, 195 Cal. 774, 235 P. 735. With this decision we agree. There are possibly cases where a complaint in the words of the statute would fail to meet the other requirement of section 1426 that a complaint must "enable the defendant to understand distinctly the character of the offense complained of," but if so this is clearly not such a case, and we need not decide what would be the rule therefor.

The judgment is affirmed.

BISHOP and SCHAUER, JJ., concur.

30 Cal.App.2d Supp. 767

## SWEENEY v. METROPOLITAN LIFE INS. CO.

Civ. A. 885.

Appellate Department, Superior Court, City and County of San Francisco, California.

Oct. 1, 1937.

**1. Insurance 🔑515**

In action to recover under double indemnity provision of life policy providing that there should be no payment of double indemnity in event that insured's death should result from injuries sustained during, or as a result of, insured's participation in, or attempt to commit, an assault or felony, wherein it was conceded that insured's death resulted from injuries sustained while participating in a hostile encounter, question was whether, without substantial conflict, evidence showed insured started the affray, or was to some extent, at least, a voluntary participant therein.

**2. Insurance 🔑646(8)**

In action to recover under double indemnity provision of life policy providing that there should be no payment of double indemnity in event that insured's death should result from injuries sustained during, or as a result of, insured's participation in, or attempting to commit, an assault or felony, wherein it was conceded that insured's death resulted from injuries sustained while participating in a hostile encounter, presumption of innocence on insured's part and inference in favor of accidental death put burden on insurer to prove facts overcoming or offsetting the presumption and inference.

**3. Evidence 🔑594**

In action to recover under double indemnity provision of life policy providing that there should be no payment of double indemnity in event that insured's death should result from injuries sustained during, or as a result of, insured's participation in, or attempt to commit, an assault or felony, wherein it was conceded that insured's death resulted from injuries sustained while he was participating in a hostile encounter, neither jury nor court had privilege of arbitrarily disregarding positive testimony of actual occurrences by witnesses, who were neither contradicted nor impeached in respect to any issuable fact.

**4. Insurance 🔑646(8)**

In action to recover under double indemnity provision of life policy providing that there should be no payment of double indemnity in event that insured's death should result from injuries sustained during, or as a result of insured's participation in, or attempt to commit, an assault or felony, wherein it was conceded that the insured's death resulted from injuries sustained while he was participating in a hostile encounter, testimony of witnesses to the assault was sufficient, as a matter of law, as to rebut the presumption of innocence on insured's part and an inference of his accidental death.

**5. Evidence 🔑595**

An "inference" is a deduction which the jury makes from proven facts, and is not a mere conjecture or an arbitrary dixit without reason and without factual support. Code Civ.Proc. § 1958.

[Ed. Note.—For other definitions of "Inference," see Words & Phrases.]

**6. Evidence 🔑597**

A judgment cannot be based on guesses or conjectures, and a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence.

**7. Costs 🔑245**
**Courts 🔑189(15)**

Where defendant's motion in municipal court for judgment in its favor notwithstanding verdict for plaintiff should have been granted, the Appellate Department of the Superior Court would reverse the judgment for plaintiff with directions that judgment be entered for defendant's costs of suit.

Appeal from Municipal Court of City and County of San Francisco; Theresa Meikle, Judge.

Action on the double indemnity provisions of a life policy by May Sweeney against the Metropolitan Life Insurance Company. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed with directions to enter judgment for defendant.

Knight, Boland & Riordan and James W. Archer, all of San Francisco, for appellant.

Stanley Burke, of San Francisco, for respondent.

JOHNSON, Presiding Judge.

This is an action brought upon a policy issued by the defendant upon the life of Terrence J. Sweeney in the sum of $1,000 payable to the insured's mother, May Sweeney, and embodying a supplementary contract for payment of double indemnity in the event of death by external, violent and accidental means, subject, however, to the proviso, among others, that "death shall not have resulted from bodily injuries * * * sustained while or as a result of participating in or attempting to commit an assault or felony".

Upon the death of the insured, which occurred as the result of injuries sustained in an affray in which he was a participant, the defendant paid to the plaintiff as the beneficiary of the policy the sum of $1,000, the face amount of the policy, but refused to pay the additional sum of $1,000, claimed under the supplementary contract. The refusal was based on the contention that under the circumstances attending the insured's death, the proviso mentioned barred all right to the double indemnity.

The action was instituted for recovery of the sum of $1,000 under the supplementary contract. The case was tried with a jury; and upon conclusion of the evidence the defendant moved for a directed verdict in its favor. That motion was denied; and upon submission of the case to the jury, a verdict was rendered in favor of plaintiff for $1,000. Thereupon the defendant made, in alternative form, a motion for judgment in its favor notwithstanding the verdict. That motion having been denied, and judgment having been entered on the verdict, the defendant prosecuted this appeal.

[1] It is conceded that the death of the insured resulted from injuries sustained while a participant in a hostile encounter. The real point of the controversy centers upon the question whether, without substantial conflict, the evidence shows that the insured started the affray or was to some extent at least a voluntary participant therein.

It becomes necessary therefore to give attention to the salient features of the testimony. On Saturday night, June 24, 1933, the insured, Terrence J. Sweeney, had attended a dance at Guerneville with his friend, Jack McCoy. While there, they had, as McCoy said, "a few beers"; and as they left the dance hall shortly before 1 o'clock Sunday morning and walked along the main street, Sweeney became embroiled in the encounter which led to his death. McCoy was unable to remember what occurred as he and Sweeney walked along or to tell anything about the circumstances leading to Sweeney's death. The story of the affray was told by seven young men who were engaged in conversation together as Sweeney and McCoy passed; and with two of whom separately, the brothers John and William Mulkeen, Sweeney came into conflict. Those seven young men, though present at the trial under subpœnas issued at the instance of defendant, were called to the stand as witnesses by the plaintiff; and when, after those witnesses had been examined at length, the plaintiff rested, the court had before it all the evidence in the case.

There were, as one would expect, some variances in minor details in the testimony of those young men; but from consideration of the evidence as a whole, we cannot escape the conclusion that it proves convincingly and without substantial conflict that Sweeney was himself the aggressor, and picked a fight without any provocation.

Four of the young men, including William Mulkeen, had been camping near Guerneville for a time. They were in an automobile stationed at the curb near the dance hall. John Mulkeen and others of the party had come from San Francisco for the week-end. They had been at the dance with their friends; but as they were not staying at the camp, they stood on the sidewalk while they discussed with those in the automobile arrangements for a swim next day.

Without dispute in the testimony it appears that Sweeney and McCoy passed the group so engaged in conversation, and then turned and came back to the place where John Mulkeen, standing on the sidewalk, was talking with his brother William sitting in the car. Sweeney, on approaching those standing, asked which one of them had said something. On being informed that none of the group had said anything, he then accosted John Mulkeen, asking if the latter had said anything. On receiving an answer in the negative, Sweeney, without warning, hit John in the face. The two men wrestled together and fell from the curb to the roadway. Mulkeen disentangled himself and moved off, holding his bleeding nose. Sweeney followed, shouting to Mulkeen, "Come back and I will give you some more." As Sweeney was chasing John Mulkeen around the automobile, the latter's brother, William, got out. He told Sweeney that they did not want to fight with him and to let John alone. One of the party, Monahan, tried to stop Sweeney, whereupon Sweeney swung at him, and then turned his attention to William Mulkeen, challenging him to fight. William tried to back away, but was hit by Sweeney; and in seeking to defend himself, William Mulkeen gave Sweeney a blow which caused him to fall backward and strike his head on the pavement, thereby sustaining injury resulting in his subsequent death.

Sweeney was six feet four inches tall and weighed about one hundred and sixty pounds. John Mulkeen was of about the same weight, and six feet one inch in height; but William Mulkeen's height was only five feet six inches and his weight one hundred forty-five pounds.

Such is a composite recital of the evidence, given without substantial conflict by those who witnessed the occurrence. Joseph Chiesa, Tr. pp. 14–18, 22, 24; William Mulkeen, pp. 27–31, 34–36; Frank Monahan, pp. 40, 41; Frank Bertolucci, 47–50; John Mulkeen, 52–55; Angelo Chiesa, 59–61; Amenante Celoni, 67, 68.

Sweeney's attack upon John Mulkeen and his encounter with William were so closely connected as to constitute parts of a single transaction. Not only was his aggressive intent manifested at the start by his words, but his actions evidenced still more loudly his determination to work bodily harm. He was not merely a participant in the assault. He was the instigator. The hostilities were wantonly provoked by himself, and were of such serious nature that he might reasonably have expected that indignation would be aroused and that injury might result.

The case in essentials is almost a fellow to Gray v. Western States Life Ins. Co., 214 Cal. 695, 8 P.2d 126, 127, in which double indemnity was denied under a policy excluding such recovery in case death should result from "any violation of law" by the insured. In that case the insured John R. Gray made a wilful assault upon a friend, who in self-defense and to protect himself struck Gray, causing him to fall and suffer injuries resulting in death.

[2] The respondent cites in opposition Gilman v. New York Life Ins. Co., 190 Ark. 379, 79 S.W.2d 78, 97 A.L.R. 755, which dealt with a policy similar to that before us. The insured's death was the result of a pistol shot fired by another. It was there held that the defendant had not sustained the burden of proving justification for the killing as against the presumption of accidental death. The court declared, however, that if the insured is killed by another in his necessary self-defense, then the insurer has a complete defense in an action on the policy for accidental death. Considerable is said in respondent's brief about a presumption of innocence on Sweeney's part and an inference in favor of accidental death, which put the burden on the defendant to prove facts overcoming or offsetting such inference.

The plaintiff might perhaps have limited herself to producing merely sufficient evidence to make a prima facie case of accidental death, and then have given way to the defendant to present the witnesses it had subpœnaed. But plaintiff followed the course of appropriating defendant's witnesses; and when their examination had been concluded, all the facts and circumstances were before the court.

[3] The witnesses to the assault were not contradicted or impeached in respect of any issuable fact, and neither the jury nor the court had the privilege of arbitrarily disregarding the positive evidence of actual occurrences. Hayward v. Rogers, 62 Cal. 348, 372; Hutchison v. Holland, 47 Cal.App. 710, 712, 190 P. 1072; Hynes v. White, 47 Cal.App. 549, 552, 190 P. 836.

[4] The facts having been proved by the uncontradicted and unimpeached testimony of witnesses called by plaintiff, under circumstances affording no indication that the testimony was the product of mistake, inadvertence or untruthfulness, the evidence adduced was so wholly irreconcilable with the presumption and the inference sought to be invoked as to cause them to be dispelled and disappear from the case. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269.

[5] An inference is a deduction which the reason of the jury makes from the facts proved. Sec. 1958, Code Civ.Proc. It is not a mere conjecture or an arbitrary

dixit without reason and without factual support.

[6] As is said in the recent case of Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, 935: "A judgment cannot be based on guesses or conjectures. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480. And also 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.' 23 Cor.Jur. § 1750, p. 18."

[7] We conclude that defendant's motion for judgment in its favor notwithstanding the verdict should have been granted. Accordingly the judgment for plaintiff must be reversed with directions to the municipal court to enter judgment for defendant for its costs of suit. Defendant will be entitled also to its costs on appeal.

CONLAN, J., and ROBINSON, Judge pro tem., concurred.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8906

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

NATIONAL UNIVERSITY